Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOSE ORLANDO GALLEGO,
Petitioner,

v.

SERVICE LLOYDS INSURANCE COMPANY
Respondent.

Petition for Writ of Certiorari
To The Court of Appeals For The
First District of Texas

PETITION FOR WRIT OF CERTIORARI

JENSEN & MAGAN, P.C.
E. CASEY MAGAN
Attorney of Record
440 Louisiana, Suite 1210
Houston, Texas 77002
(713) 223-4222
(713) 237-8818 (Fax No.)

80 pp

QUESTIONS PRESENTED

Whether defense counsel's untrue statement to a jury panel during jury selection that a workers' compensation plaintiff of Colombian heritage "was not in the country legally" at the time of his workers' compensation injury, thus implying he was an "illegal alien," denies a litigant of Hispanic or Colombian ancestry the right to a fair trial by depriving him due process and equal protection under Section One of the Fourteenth Amendment to the Constitution of the United States.

Whether defense counsel's untrue statement to a jury panel during jury selection that a workers' compensation plaintiff of Colombian heritage "was not in the country legally" at the time of his worker's compensation injury, thus implying he was an "illegal alien," amounts to "plain error," as to which the Court of Appeals for the First District of Texas and the United States Court of Appeals for the Fifth Circuit are in conflict.

PARTIES TO THE PROCEEDINGS

Jose Orlando Gallego
Service Lloyds Insurance Company

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THE OPINION BELOW

The opinion of the Court of Appeals for the First District of Texas, affirming the trial court's judgment and jury's verdict held that:

> ...the single statement about which Gallego complains was (1) invited by Gallego's statement during voir dire, (2) curable by instruction that was delayed but was never refused by the trial judge, (3) cured by the uncontested evidence Gallego presented during trial, and (4) less offensive than appeals to racial, religious, or national prejudice that we have previously held to be incurable.

Jose Orlando Gallego v. Service Lloyds Insurance Company, No. 01-94-00883-CV, p. 11, unpublished, a copy of the opinion is reproduced as Appendix A. The Denial of Writ of Error to the Texas Supreme Court is reproduced in Appendix B, and the Texas Supreme Court's denial of Rehearing is reproduced in Appendix C.

JURISDICTION

The Court of Appeals for the First District of Texas rendered judgment and issued its opinion on April 13, 1995. Gallego filed a timely motion for rehearing on May 3, 1995, which the Court of Appeals denied on May 18, 1995. Gallego then filed his application for writ of error to the Supreme Court of Texas on June 27, 1995, which was denied on February 9, 1996. Gallego filed a timely motion for rehearing on March 7, 1996, which the Supreme Court of Texas denied on March 28, 1996. This Petition for Writ of Certiorari was filed with the clerk of this court within ninety days of the Texas Supreme Court's Order Denying Rehearing and is timely. Supreme Court Rule 13.1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented involves the due process and equal protection clauses of Section One of the Fourteenth Amendment to the Constitution of the United States, which amendment in its entirety reads as follows"

AMENDMENT XIV

"**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Background to the Issue

Mr. Gallego came to the United States from Columbia. Although he can speak and read English, he has a very heavy accent and he exercised his right to utilize the services of an interpreter at trial because he sometimes has problems understanding English, and wanted to make sure he understood at trial. He is married to Elaine, a United States citizen, and they have been married since 1984. He injured himself when he fell off of a ladder at work in June of 1990. He was the only witness to his injury.

At the time of his injury, he was documented and working legally for Joe Meyers Mitsubishi, a local car dealership, as a "make-ready man." These facts were elicited

by Gallego's counsel only after Service Lloyds made the following improper argument during jury selection:

> Now, to clear up one thing that was brought up in voir dire that is not quite correct that I want to tell you about it now, I'll ask you about it later, it involves bias and prejudice. **Mr. Gallego at the time of the accident was not in the country legally**, nor had he been here some years before (Emphasis added). (Appendix D).

The implication of the statement was, of course, that Gallego was an illegal alien without authorization to work in the United States at the time he suffered the on-the-job injury for which he was seeking compensation in one of the Texas State District Courts.

Immediately after the improper statement was made, counsel for Gallego objected to the statement on grounds that it was false and prejudicial. The Court stated that Gallego's status at the time of his injury was not relevant and that he might correct defense counsel's statement with an instruction. (Appendix D). The trial judge did not wish to consider proof of Gallego's "legal" status at the time of his injury, protesting that he was not an immigration judge and was "not about to sit here and determine whether this man was here legal or illegally." (Appendix E).

Although hospital and doctors' records were admitted by Gallego without objection by which it was proved that Gallego showed objective signs of injury, was found by the medical technicians on the floor of the dealership and taken directly by them to the hospital emergency room, the jury found in response to question 1 of the jury charge that Mr. Gallego did not receive an injury on or about June 15, 1990 in the course of his employment. Because all other questions

were predicated upon an affirmative answer to question 1, the jury did not answer any other questions. Mr. Gallego lost his trial.

B. How the Federal Question was presented

Gallego raised the issues that he had been denied the right to fair trial and that the statement made during voir dire amounted to prejudicial error in his Motion for New Trial. (Pertinent portions have been reproduced in Appendix F). The Motion was denied.

In addition, Gallego's Brief to the Court of Appeals for the First District of Texas raised the issue of his having been deprived equal protection under the law. (Pertinent portions have been reproduced in Appendix G). In its Opinion (Appendix A), the Court of Appeals holds:

> ...the single statement about which Gallego complains was (1) invited by Gallego's statements during voir dire, (2) curable by instruction that was delayed but was never refused by the trial judge, (3) cured by the uncontested evidence Gallego presented during trial, and (4) less offensive than appeals to racial, religious, or national prejudice that we have previously held to be incurable.

In his Motion for Rehearing in the Court of Appeals, Gallego reiterates his due process and equal protection arguments, (pertinent portions have been reproduced in Appendix H), but his motion for rehearing was denied. Mr. Gallego continued to complain about his deprivation of a fair trial, and violations of due process and equal protection under the United States Constitution in his Application for Writ of Error to the Supreme Court of Texas (pertinent

portions have been reproduced in Appendix I), and, although the Texas Supreme Court denied his application with the notation "Writ Denied," (Appendix B), he reurged his complaints concerning no fair trial and having been branded a criminal by the implication he was "illegal" without due process of law, invoking the Fifth and Fourteenth Amendments to the Constitution of the United States in his Motion for Rehearing to the Texas Supreme Court (pertinent portions have been reproduced in Appendix J), as he did again in his Reply to Response to Motion for Rehearing (attached in its entirety as Appendix K). His Motion for Rehearing was overruled (Appendix C).

REASONS FOR GRANTING THE WRIT

A. The decision of the Texas Court of Appeals is in conflict with the decisions of the Fifth Circuit.

The Texas opinion complained of here holds that counsel's untrue assertion that "Mr. Gallego at the time of the accident was not in the country legally, nor had he been here some years before" was cured by uncontested evidence that Gallego presented during trial, and was "less offensive than appeals to racial, religious, or national prejudice that have previously been held to be incurable." (Appendix A, p. 11).

In contrast to the Texas Court of Appeals' decision, the Fifth Circuit has held that a reference to a litigant as an "illegal alien" during closing argument was highly prejudicial and a blatant appeal to racial and ethnic prejudice. *Rojas v. Richardson*, 703 F.2d 186, 192 (5th Cir. 1983, *reh'g granted and judgment aff'd* 713 F.2d 116). Even on rehearing, when it was discovered by the Fifth Circuit that plaintiff's counsel had first told the jury during voir dire that Mr. Rojas was an illegal alien, the Court still characterized the argument by

defense counsel as "highly prejudicial and a blatant appeal to jury bias." *Rojas v. Richardson*, 713 F.2d. 116, 118 (5th Cir. 1983, *on reh'g*). The Fifth Circuit's opinion on rehearing changes only with respect to their previous finding of plain error.

In the first *Rojas* decision, the Fifth Circuit found that the defense attorney's reference to Mr. Rojas as an "illegal alien" was outside the record, as counsel's reference is in this case, and was found to be so prejudicial so as to amount to plain error; thus, Mr. Rojas' failure to object was of no consequence. *Rojas*, 703 F.2d. at 190-192. In the second *Rojas* decision, because the Court had been presented new evidence that Mr. Rojas had been referred to as an "illegal alien" during voir dire by his own counsel, the lack of plaintiff's objection to the term during closing argument became fatal. *Rojas*, 713 F.2d. at 118 ("...in view of the knowledge which the jury had throughout the trial as to plaintiff's legal status, we cannot find that in the absence of objection by plaintiff's counsel this argument was so prejudicial as to be plain error").

In stark contrast to the *Rojas* case, Mr. Gallego's counsel did object (Appendix D), and although she referred to her client as "Hispanic" during voir dire, she never referred to him as an "illegal alien."

B. You Cannot Invite a Lie.

The Texas Court of Appeals creates a dangerous precedent when it holds that a falsity can somehow be invited by the legitimate questioning of a jury panel regarding any possible prejudice against a party, in this case a Colombian legally residing and authorized to work in this country, who utilized his right to an interpreter at trial. *See e.g., Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App. -- Houston [14th

Dist.] 1993, writ denied) (voir dire statements and questions of counsel for resident alien to ascertain whether prospective jurors were biased or prejudiced in favor of or against defendant because of his nationality, wealth and status were within the scope of proper voir dire examination).

Mr. Gallego came to court with what can sadly be classified as fairly major handicaps: he could not speak English very well and was obviously from another country. He had the right to test the prejudices and potential bias of his jury panel, especially with the ubiquitous debate surrounding the overwhelming popularity of California's Proposition 187, the tax-supported increase in border patrols in Texas and other border states, as well as proposed federal mandates and newspaper editorials about persons that are in our country illegally and the benefits to which they should or should not be entitled under our laws. No one can seriously argue that the debate surrounding illegal aliens was not on the mind of every citizen juror at the time this case was heard. For Mr. Gallego's counsel not to have asked the questions she did would have been, at best, malpractice, considering the political tenor of the country and the insidious nature of bias and prejudice. The idea that Mr. Gallego's right to test his panel for bias and prejudice somehow invited a falsity by an opposing officer of the court is at best illogical. Such a notion would turn the law on its head.[1]

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[1] The Court of Appeals further considered Gallego's attorney's repeated references to Gallego's heritage as "race-baiting" that invited a response. *Opinion*, p.11. Such a conclusion is not warranted because all such references to Gallego's heritage, except of course for those made during voir dire, were made after the attorney falsely stated that Gallego was in the country illegally at the time he was hurt, and were made by Gallego's attorney in an effort to continue to hopefully soften the effect of his using a translator at trial.

Even if, by the longest stretch of the imagination, it is taken as

This matter involves a false statement that effectively accused the plaintiff of being a criminal -- an *illegal* alien. Outside the protective immunity of the courtroom the statement would have risen to the level of defamation. The statement was made by an officer of the court during a trial in which Gallego himself was the only fact witness to his injury. Gallego's credibility, of paramount importance precisely because he was the only witness to his injury, was falsely and effectively ruined before he ever presented his case. Anything he told the jury -- including his own statement that he was, indeed, here legally at the time he was hurt -- was cast in doubt as compared to what Service Lloyds' attorney told them as a officer of the court.

As the Court of Appeals has noted, "[t]his case rested on the credibility of a single interested witness, Gallego." (Appendix A, p. 7). By attacking his credibility at the outset by falsely accusing him of being a criminal -- an *illegal* alien, by making a statement wholly unsupported by any evidence, Service Lloyds' attorney destroyed Gallego's credibility, thus ensuring that the case was over before it had begun.

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true that Gallego's attorney was trying to appeal to racial sympathy for this Colombian gentleman during a trial in which several *Batson* challenges had been made, no references to Gallego's heritage were made until after the falsity was asserted to the jurors as fact, and still provides no ground for an officer of the court to state a falsehood to benefit the defense's case.

Finally, Mr. Gallego does not complain that the opposing attorney called him an alien, which may have been invited by Gallego's attorney's references to her client's heritage, but that he falsely accused him of being an *illegal* alien.

C. Plain Error

The Court of Appeals has stated in its Opinion that "the mere mention of one's nationality is not per se erroneous." (Appendix A, p. 10). Gallego agrees with that statement, but with all due respect, such a statement misses the issue entirely.

This case does not involve the mere reference to Mr. Gallego as Hispanic or Colombian. This case does not involve any party's comments regarding Gallego's nationality. His nationally was stated and was obvious to everyone in the courtroom. It was clear to everybody that he was not white; it was clear to everyone that he did not speak English well, and that he used an interpreter throughout the trial, and Gallego does not make, and has not made, that complaint on appeal. This case does not even involve the attorney's reference Gallego as an alien.

The fundamental harm complained of is that Mr. Gallego was accused, by the attorney's statement, of being an *illegal* alien. This case involves the false statement that Mr. Gallego was, at the time he was injured, **in the country illegally** and the extraordinarily prejudicial effect such a false statement had upon the jury panel.

An instruction to disregard could not have cured the error, and may have contributed to the statement's prejudicial effect. By instructing the jury to disregard the statement, the jury would have been left with the impression that indeed, Jose Gallego was illegal when he was injured at work, but that such a 'fact' was merely irrelevant to their considerations.

The Court of Appeals further held that Gallego himself nevertheless cured the falsity when he testified that

he *was* in the United States legally and was properly authorized and documented to work. Perhaps it is true that his testimony alone could have cured the error; but such a conclusion assumes that the jury believed him. Counsel's statement that Gallego was working "illegally" functioned as the ultimate form of impeachment, shrouding everything Gallego said at trial with suspicion and probable ill-will -- even though it was false. No testimony by Gallego could have effectively rebutted a false statement made by an officer of the court who had, with his false statement, effectively accused him of being a criminal. No instruction could have effectively cured the inflammatory and prejudicial effect of the untruth. Gallego's credibility, of paramount importance precisely because he was the only witness to his injury, was falsely and effectively ruined before he ever presented his case. Anything he told the jury -- including his own statement that he was, indeed, in the United States legally at the time he was hurt -- was cloaked with suspicion.

The statement was untrue, it was wholly outside of the record and it falsely accused Gallego of being *illegal* when he was injured, effectively branding him a criminal without due process of law, and continues to be made during a time when public passions and prejudices against illegal aliens run deep. The statement was made by an officer of the court and is nothing but offensive.

D. Due Process and Equal Protection Violations

The argument was improper, inflammatory and prejudicial in the extreme. It clearly imputed dishonesty to Gallego, was an appeal to prejudice and passion and was reasonably calculated to cause, and probably did cause, the jury to render an improper verdict. The reference that Gallego was not in the country legally, and the implication that he was an illegal alien at the time he was injured is

unsupported in the record, is prejudicial, and denied him his right to a fair trial because **one that was working here "illegally" when he was hurt is not "equal before the law" to law abiding citizens and jurors.** *See Rojas v. Richardson*, 703 F.2d 186 (5th Cir. 1983, *reh'g granted and judgment aff'd* 713 F.2d 116).

Gallego was accused of being a criminal when he was branded *illegal* by Service Lloyds' attorney. He was labeled a criminal without the benefit of due process and merely because his race, nationality, language and appearance made him seem so. He was thus denied equal protection under the law, and his right to what should have been a fair trial, solely because he was a Colombian using an interpreter.[2]

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[2] Mr. Gallego testified that although he spoke English, he was using an interpreter at his trial "Because I have problems, things that I don't understand, and I wanted to make sure that I would understand everything." The challenged statement's prejudicial effects were exacerbated by counsel for Service Lloyd's frequent attacks on Gallego's right to use an interpreter:

> (Counsel's statement, again during voir dire):
> I think the evidence will show that on a benefit of the doubt when some person -- by the way, Mr. Gallego does speak English. He understood me at his deposition.
>
> (Council's questioning of defense witness):
> "Does he speak English, could he understand you?"
> "Yes."
> "You're sure?"
> "Yes."
> "Had you spoken to him in English before?"
> "Yes."
>
> (Counsel's questioning of another defense witness):
> "Did Jose Gallego speak English?"
> "Yes, sir."

Mr. Gallego was clearly an alien. The attorney's false statement made him an *illegal* alien. He was thus denied equal protection under the Fourteenth Amendment to the Constitution of the United States because "no greater burden should be laid upon one than are laid upon others in the same calling and conditions." *Barbier v. Connolly*, 5 S.Ct. 357, 113 U.S. 27 (1885). Indeed, merely because of Mr. Gallego's apparent ethnicity, he was readily understood to fall into a class of persons who *could* be illegal; opposing counsel's statement took advantage of Gallego's ethnicity and made him so.

E. Violation of Gallego's Right to a Fair Trial

Gallego had a right to a fair trial under both the Texas Constitution and the United States Constitution. *In re Murchison*, 349 U.S. 133, 136 75 S.Ct. 623, 625 (1955) ("[a] fair trial in a fair tribunal is a basic requirement of due process"); *Babcock v. Northwest Memorial Hospital*, 767 S.W.2d 705, 708 (Tex. 1989) ("[i]n Texas, the right to a fair and impartial trial is guaranteed by the Constitution").

In view of the increasing debate surrounding illegal aliens, and in view of the ever-increasing growth of this countries Hispanic population -- both citizens of the United States as well as those persons that are here by virtue of the authority of the United States, as was Mr. Gallego -- it is important to address this issue and prevent the injustice experienced by Mr. Gallego from being easily repeated with other citizens and alien residents of our country merely because of their nationality and ethnicity.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

JENSEN & MAGAN, P.C.

By: _____

E. Casey Magan, #12809800
440 Louisiana, Suite 1210
Houston, Texas 77002
Telephone: 713/223-4222
Telefax: 713/237-8818
Attorney for Appellant,
Jose Orlando Gallego

Proof of Service goes to:

Edward J. Mahar
Law Offices of Edward J. Mahar
3401 Louisiana, Suite 260
Houston, Texas 77002-9547
Phone: 713/523-2914
Fax: 713/529-6612

APPENDIX A

Judgment affirmed and Opinion filed April 13, 1995

In The
COURT OF APPEALS
For The
FIRST DISTRICT OF TEXAS

NO. 01-94-00883-CV

JOSE ORLANDO GALLEGO, Appellant

V.

SERVICE LLOYDS INSURANCE COMPANY, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 91-05785

O P I N I O N

This is an appeal in a worker's compensation act case from a jury verdict favorable to the appellee, Service Lloyds Insurance Company, finding that the appellant, Jose Gallego, did not suffer an injury while employed. We affirm.

On June 15, 1990, Steven Palmisano, an employee of Joe Meyers Mitsubishi (Joe Meyers) heard Gallego, a fellow employee, call for help. Moments earlier, he had noticed Gallego lying on the ground under a vehicle and thought Gallego was working normally. When Gallego called for help, he "seemed to be in the same position" as before the accident, but said that his back hurt. Palmisano sought help.

Carrie Morris, another employee, had seen Gallego walking between vehicles with cleaning supplies. She later saw him under a vehicle. At first, she thought Gallego was working under the vehicle, but then she heard him cry out.

Gallego testified that on June 15, 1990, he was applying a protectant to the roof of a Mitsubishi Montero, a jeep-type vehicle. He was using a four-and-a-half to five-foot ladder to apply the protectant. As he stretched across the truck, he lost his balance and fell backwards to the ground. He believed that he lost consciousness. He complained of head and back pain. He was taken by ambulance to Cy-Fair Hospital. Nobody saw Gallego fall. Thus, he was the sole witness to testify that he did, in fact, fall.

Two days later, Gallego fainted at home. He was taken by ambulance to Katy Hospital. He was treated and released. A few days later, an attorney referred Gallego to Dr. Chana. Gallego testified that he could not bend, stoop, or lift heavy objects after the fall. He did not seek to return to work at Joe Meyers; in January 1991, he began working for another employer.

Gallego's wife, Elaine, testified that when she first saw Gallego after the alleged fall, he was lying on the ground, in pain and pale. She testified that after that time, Gallego could not dress himself or pick up anything.

In his first point of error, Gallego contends that the trial court erred in overruling his motion for judgment notwithstanding the verdict because he proved a work-related injury as a matter of law.

In reviewing a no evidence point of error, we consider only the evidence and reasonable inferences

favorable to the jury's findings; contrary evidence and inferences are disregarded. *King v. Bauer*, 688 S.W.2d 845, 846 (Tex. 1985).

No testimony was presented from any medical expert; only medical records were presented. These showed that numerous tests were conducted on Gallego by Cy-Fair Hospital and by Dr. Chana, many or most of which were negative. No evidence was presented that any of the many tests showed an injury suffered in a fall on June 15, 1991. Only Gallego and his wife testified he was hurt, and only Gallego testified that he was ever on a ladder or that he fell from it.

The evidence favorable to the jury's verdict includes the following:

> Page three of plaintiff's exhibit four, a document entitled "Cypress Fairbanks Medical Center Emergency Department," states
>
> > [illegible] - C - spine - neg
> >
> > L - spine - neg
> >
> > pelvis - neg
> >
> > T - spine - neg
>
> Page nine of that exhibit is a "radiology consultation" and states:
>
> > PELVIS: AP pelvis including frog leg view. The bony structures are normal. The joint spaces are well maintained. The soft tissues are unremarkable.

CONCLUSION: Negative study.

CROSS TABLE LATERAL CERVICAL SPINE: No gross fracture or disalignment.

CERVICAL SPINE SERIES: Normal curvature. Vertebral body heights and intervertebral disc spaces are normal. Widely patent foramina bilaterally. Unremarkable spot film of the odontoid.

CONCLUSION: Negative cervical spine series.

DORSAL SPINE: Mild anterior degenerative lipping of the dorsal spine is apparent and minimal scoliosis with a convexity to the left was present. Pedicles were intact. No fractures were seen.

CONCLUSION: Essentially negative dorsal spine study.

LUMBROSACRAL SPINE: Mild anterior degenerative lipping at the L3-4 level was apparent. No fractures were seen on the oblique views. No spondylolisthesis or spondyloysis.

CONCLUSION: Essentially negative lumbrosacral spine study.

Page two of plaintiff's exhibit five states that Gallego's "bowel gas pattern is not remarkable. The stomach contains food debris with an air fluid level.

There is no evidence of free intraperitoneal air, significant air fluid level, or other specific abnormality."

On page three, Gallego's urinalysis, protein, glucose, ketone, bilrubin, and blood are circled "NEG." Nitrite is circled "NEGATIVE." "Yellow" and "Clear" are circled. "Specific gravity" is listed as "15." "Point zero, one" is circled next to "Urobilinogen." "WBC'S (Dipstick)=Neg" is written in the comments section.

Page four shows that sodium, potassium, "CO2," "BUN," "SR Creatinine," "WBC," "RBC," "HGB," "MCV," "MCH," "MCHC," platelet, lymph, and "GRAN" levels fell within normal ranges.

Page eight of plaintiff's exhibit six shows that Gallego's electroencephalogram reported that Gallego's "9-10 HZ alpha frequencies" were [w]ell organized and sustained" during wakefulness. "There were no background asymmetries. No epileptiform activity was recorded." Hyperventilation showed "[n]o significant change." "Bilateral driving responses were present" in "photic stimulation". The "clinical interpretation" showed "a normal EEG with the he{sic} patient awake."

Page nine, Gallego's X-ray report, states that "[t]he ventricles and sulci are unremarkable. There is no evidence of mass. hemorrhage, or infarc. Bone windows do not reveal fracture or additional abnormality." The doctor's impression was of a "NORMAL CT OF THE HEAD."

Page 12 is a medical narrative from Dr. Chana to Service Lloyds. Dr. Chana stated that the "[n]eurological examination was within normal limits and cardiovascular system examination was negative." Additionally, "a ct scan of the head and EEG ... were within normal limits."

Page Four of plaintiff's exhibit seven is Gallego's "History and Physical Examination" from Dr. Chana's records. Dr. Chana noted no external injuries to Gallego's head. The doctor noted "normal" tongue and palate movements, eyes, nose, chest, heart sounds, and peristaltic sounds. Gallego's ears and lungs were "clear" and his extremities were free of abnormalities.

Page 11 showed that Gallego had a urinalysis and EEG on June 16, 1990, that were normal. He had a CT scan on June 20, 1990, that was also normal.

Page 29 shows that a "CHEM 7" test revealed normal ranges for "Na," "K," "CL," "TCO2," "BUN" and "CREA."

Page 33 is essentially the same document as page eight of plaintiff's exhibit six. The only differences are corrections of the typographical errors and the signature of "F.W. Nelson, M.D."

Page 34 is the same document as page nine of plaintiff's exhibit six.

Gallego testified that Dr. Chana told him that everything was "okay."

> Elaine Gallego testified that Dr. Chana "ran a bunch of tests on [Gallego]. Thank God those came back normal. There was nothing majorly wrong with him."
>
> Morris testified that she saw Gallego lying on the ground near the front of the truck, and saw the ladder near the back of the truck. She observed approximately five feet of distance between Gallego and the ladder. The steps of the ladder faced the truck. Gallego was lying on the side of the truck. Had he fallen forward, he would have landed on the truck; had he fallen backward, he would have landed on another vehicle. Gallego was not bleeding when Morris saw him. Morris did not think Gallego had fallen from the ladder or that he had hurt himself. She did not see Gallego use the ladder.

The exhibits and testimony constitute some evidence that Gallego was not injured on June 15, 1990, in the course of his employment. The jury could have concluded that Gallego never fell as he claimed he did.

We overrule the first point of error.

In his second point of error, Gallego contends that the trial court erred in overruling the motion for JNOV because he proved his damages as a matter of law. In light of our holding overruling point of error one, we need not reach Gallego's second point of error.

In his third point of error, Gallego complains that the trial court erred in overruling the motion for new trial because the jury's verdict was against the great weight and preponderance of the evidence.

In reviewing a factual sufficiency point of error, an appellate court "must consider and weigh all the evidence, and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

The evidence supporting the jury's verdict has been outlined above. The evidence supporting Gallego consists of the following:

> Plaintiff's exhibit three consists of a Jersey Village volunteer fire department report filed on June 15, 1990. Emergency Medical Technician Debbie Muery states that Gallego had "slight swelling left side below waist ([sic] appeared to be muscle spasm." Gallego's blood pressure was elevated when EMS arrived.
>
> Plaintiff's exhibit four at page one is an emergency room doctor's report from Cy-Fair Hospital diagnosing "1. multiple trauma 2. head injury 3. concussion 4. back sprain contusion."
>
> On page five, Gallego is instructed "[b]ed rest. No work or sports or bending or lifting. Warm compresses to back."
>
> Plaintiff exhibit five at page four shows that Gallego had a decreased level of chloride and an increased level of glucose and "MONO."
>
> Gallego's admission record to Doctor's Hospital on June 19, 1990, which is found at page seven of plaintiff's exhibit six, shows a diagnosis of "head injury" and "trauma to neck and back."

At pages 14 and 15, Dr. Chana notes that "[t]he patient at this point [June 19, 1990] was suspected of intra-cranial lesion because of the injury enhanced and was admitted to Doctor's Hospital as an emergency." Dr. Chana prescribed Soma and vicodin for pain and muscle spasms.

In a letter to Service Lloyds on page 16, Dr. Chana states that Gallego "was found to have a concussion and he required immediate hospitalization."

Page one of plaintiff's exhibit seven is a medical record from Doctor's Hospital signed by Dr. Chana noting that Gallego was admitted to the hospital on June 19, 1990, and discharged on June 22, 1990. Dr. Chana diagnosed "head injury" and "trauma neck & back."

On page four, Dr. Chana notes that Gallego's neck is stiff "because of tenderness of the paravertebral muscles" and that "there is tenderness and spasm of the muscles of the paravertebral group. There is a lot of tenderness over the left Trapezius area and around the left shoulder." His "DIAGNOSIS ON ADMISSION" was of "[i]ntracranial injury. Injury to the back and shoulders."

Pages four and five consist of Dr. Chana's "Progress Notes". Dr. Chana writes that Gallego was admitted with "disorientation + mild drowsiness ataxia + amnesia of recent events." The doctor noticed that Gallego had a "slow spastic gait."

Page 11 consists of Gallego's "Discharge Summary" from Doctor's Hospital signed by Dr. Chana. The final diagnosis was "[h]ead injury. Trauma to the

neck and back." Gallego was prescribed a saline IV, Robaxin, Motrin, Valium and Darvocet. When he was admitted, "he appeared to be slightly disoriented and ataxic and could not talk properly."

Pages 15 and 19 list the medications Gallego was prescribed at Doctor's Hospital.

Page 29 shows an increased level of "GLU" on the "CHEM 7" test.

In order to find for Gallego, the jury had to believe Gallego's testimony that he fell from a ladder. Nobody saw him on a ladder. Nobody saw him fall. Nobody testified that any of the many medical tests showed injuries consistent with a recent fall from a ladder. A jury is generally free to believe or not believe all or any part of any witness' testimony. This case rested on the credibility of a single interested witness, Gallego. The jury's refusal to believe his testimony was not against the great weight of the evidence.

We overrule the third point of error.

In his fourth through sixth points of error, Gallego complains that the trial court erred in overruling his motion for mistrial and for new trial because of improper statements by appellee during voir dire.

Service Lloyds' attorney stated during voir dire that "Mr. Gallego at the time of the accident was not in the country legally, nor had he been here some years before." Gallego asserts that there is a greater probability that this statement caused harm than that the verdict was based upon proper proceedings and evidence.

During voir dire, when the statement was made, Gallego objected that the statement was "untrue" and "awfully prejudicial." The trial judge did not rule on Gallego's objection; instead, he said, "I may correct it with an instruction." When voir dire was complete, Gallego moved for a mistrial, which was denied. Gallego asked for an instruction, to which the court replied, "I'll deal with that at the end of the trial." Gallego did not request further instruction to the jury later in the trial, and none was given.

Gallego argues that Service Lloyds' comments were so prejudicial and inflammatory as to be incurable, and thus, no objection was required to raise the issue on appeal. *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 333 (Tex. 1968); *Haryanto v. Saeed*, 860 S.W.2d 913, 919 (Tex. App.--Houston [14th Dist.] 1993, writ denied). Courts have applied the general test of incurable jury argument to cases alleging improper voir dire comments. *General Motors Corp. v. Bryant*, 582 S.W.2d 521, 527 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.); *Twin City Fire Ins. Co. v. King*, 510 S.W.2d 370, 373 (Tex. Civ. App.--Houston [1st Dist.] 1974, writ ref'd n.r.e.).

In *Standard Fire Insurance Company v. Reese*, the Supreme Court wrote:

> In the case of improper jury argument, the complainant ... has the burden to prove (1) an error, ... (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge ....[,and] (5) that the argument by its nature, degree and extent constituted reversibly harmful error. How long the argument continued,

> whether it was repeated or abandoned and whether there was cumulative error are proper inquiries. All of the evidence must be closely examined to determine (6) the argument's probable effect on a material finding. (7) Importantly, a reversal must come from an evaluation of the whole case which begins with the voir dire and ends with the closing argument.

584 S.W.2d 835, 839-40 (Tex. 1979)(citation omitted). "There are only rare instances of incurable harm from improper argument." *Id.* at 839. For example, "an appeal to racial prejudice -- as opposed to the mere incidental mention of race -- constitutes reversible error even if no objection was made." *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 863 (Tex. App.--San Antonio 1990, writ denied) (footnote omitted) (appeal to jurors for unity based on Hispanic heritage). The same is true of racial slurs. *See Texas Employers' Ins. Ass'n v. Haywood*, 266 S.W.2d 855, 859 (Tex. 1954) (references to witnesses as "yellow nigs" and "yellow darkies"). Appeals to religious prejudice are incurable. *Texas Employers Ins. Ass'n v. Jones*, 361 S.W.2d 725, 727 (Tex. Civ. App.-- Waco 1962 1962, writ ref'd n.r.e.) (reference to witness as "that Jew" and arguing that he was lying for money).

Appeals to national origin have also been held to constitute incurable jury argument. *See Penate v. Berry*, 348 S.W.2d 167, 168 (Tex. Civ. App.--El Paso 1961, writ ref'd n.r.e.); *Basanez v. Union Bus Lines*, 132 S.W.2d 432, 433 (Tex. Civ. App.--San Antonio 1939, no writ). These cases are distinguishable, however. In *Penate*, the defendant's counsel made "numerous remarks" regarding the plaintiff's citizenship, such as, "you can't come into court and reach your hands into the pockets of an American citizen and take

his property from him -- not for an alien . . . ."[1] *Penate*, 348 S.W.2d at 168. In this case, we have a single statement, not "numerous" ones. Moreover, in *Penate*, the court found that the record "fails to produce sufficient evidence to justify those findings [against Penate] without some outside cause." *Id.* at 169. That is not the situation here. In *Basanez*, the theme of the defendant's closing argument contrasted the defendant as a United States citizen with the plaintiff, of whom it was said, "I don't know if he waded that river or swam." *Basanez*, 132 S.W.2d at 432-33. The defendant appealed to the jury to prevent Basanez from "expropriat[ing] $25,000 from one of our citizens" in order to make him "go back to Mexico . . . ." *Id.* at 433. Additionally, one must consider the historical context of that case because just prior to trial, Mexico "expropriated oil properties of great value, situated in that Republic, belonging to citizens of the United States of America"; no doubt, according to the court, this was on the jurors' minds. *Id.*

On the other hand, the mere mention of one's nationality is not per se erroneous. *See generally Haryanto*, 860 S.W.2d at 913. In *Haryanto*, nationality was an issue in the case because it established a motive for the appellant's assault upon the appellee.[2] *Id.* at 920. Moreover, none of the jurors was of the same nationality as either party "and

---

[1] Even though Penate testified that he had filed citizenship papers in the United States some eight years before trial, the court held that this testimony was insufficient to overcome the taint of the "numerous statements referring directly or indirectly" to the fact that Penate came to the U.S. from San Salvador. *Penate*, 348 S.W.2d at 168. As mentioned earlier the improper comments occurred during voir dire but what attorneys say during voir dire is not evidence. *See, e.g., Haryanto*,860, S.W.2d at 919. In ...

[2] Neither Haryanto nor Saeed was a U.S. citizen. *Haryanto*, 860 S.W.2d at 920.

counsel did not seek to align jurors with appellee or against appellant simple on the basis of race, ethnicity or nationality." *Id. Contra Guerrero*, 800 S.W.2d at 862 (11 of 12 jurors had Spanish Surnames as did plaintiff and counsel). In *Haryanto*, the court determined that "appellant's counsel was not deterred from remedying any prejudice that might have occurred as a result of the remarks made by appellee's counsel during voir dire." *Id.* Here, Gallego testified that he was in this country legally at the time of his injury and that his wife, who testified for him at trial, was an American citizen when they married in 1984 in the United States. Under *Haryanto*, this testimony cured the harmful effects of the improper comment. *See Haryanto*, 860 S.W.2d at 919. *But see supra* text accompanying note 1.

Moreover, at Service Lloyds points out, Gallego was the first to raise this issue. During voir dire, Gallego's attorney stated that, "Mr. Gallego is here legally"; she asked whether his "seeking to recover under the laws of the United States of America -- which he's here legally for" would prejudice the potential jurors. Gallego's counsel made repeated references to Gallego's Hispanic heritage until the trial judge reprimanded her, calling her remarks "race baiting." We conclude that Service Lloyds' comment was a response to Gallego's voir dire. No other improper comments regarding Gallego's nationality were made.

We conclude that the single statement about which Gallego complains was (1) invited by Gallego's statements during voir dire, (2) curable by instruction that was delayed but was never refused by the trial judge, (3) cured by the uncontested evidence Gallego presented during trial, and (4) less offensive than appeals to racial, religious, or national

prejudice that have previously been held to be incurable.[3]

We overrule the fourth through sixth points of error.

The judgment is affirmed.

/s/ Murry B. Cohen
Murry B. Cohen
Justice

Justices Mirabal and Taft also participating.

Do not publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered APR 13 1995
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

---

[3] Gallego contends that Service Lloyds knowingly made a false statement to the jury panel during voir dire. This is not supported by the record. No evidence showed Gallego's employment authorization card was received from Service Lloyds, as alleged in the motion for new trial. *See Estate of Arrington v. Fields*, 578 S.W.2d 173, 180 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.). Moreover, the authenticity of the purported employment authorization card was never proved. A copy was attached to the motion for new trial, but there was no hearing on the motion for new trial, and the copy is not self-proving. Finally, Service Lloyds' response to the motion for new trial contains Gallego's deposition testimony that he obtained "residence status" in 1991, after these events occurred.

APPENDIX B

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

February 9, 1996

Ms. E. Casey Magan
Jensen & Magan
440 Louisiana, Suite 1210
Houston, TX 77002

Mr. Edward J. Mahar
Law Office of Edward J. Mahar
3401 Louisiana, Suite 260
Houston, TX 77002

RE: Case Number 95-0613
Style: JOSE ORLANDO GALLEGO
v.
SERVICE LLOYDS INSURANCE COMPANY

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey, Deputy Clerk

APPENDIX C

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

March 28, 1996

Ms. E. Casey Magan
Jensen & Magan
440 Louisiana, Suite 1210
Houston, TX 77002

Mr. Edward J. Mahar
Law Office of Edward J. Mahar
3401 Louisiana, Suite 260
Houston, TX 77002

RE: Case Number 95-0613
Style: JOSE ORLANDO GALLEGO
v.
SERVICE LLOYDS INSURANCE COMPANY

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey, Deputy Clerk

APPENDIX D

fine lawyer, her voir dire, but my name is Ed Mahar, and I represent Service Lloyds Insurance Company, and I'll explain what our involvement in the case is.

I recently had an illness not a serious one, a flu or some type symptoms and yesterday I didn't feel whether I'd be able to try this case or not so I asked my partner to attend. However, I feel pretty good now. So anyway that's not a problem.

I appreciate some of Mrs. Magan's comments and before I start in to explain what I think about this case, she brought up three points that you probably need to know about. Number one, the employer is not a party to this case, and the only reason Service Lloyds is here today is because we insured Joe Meyers Mitsubishi where Mr. Gallego worked under a worker's compensation policy, and it's important to understand -- now, we have a new law now. We're trying this under the old Worker's Compensation Act where Mr. Gallego has the burden of proof to do three things. Number one, he has to show an injury; two, the injury must be in the course and scope of employment; and three, the injury must be a cause of disability.

Now, to clear up one thing that was brought up in voir dire that is not quite correct that I want to tell you about it now, I'll ask you about it later, it involves bias and prejudice. Mr. Gallego at the time of the accident was not in the country legally, nor had he been here some years before.

MS. Magan: I'm sorry. Objection. Can we approach?

MR. MAHAR: Sure.

(This discussion held at the bench)

MR. MAHAR: Go ahead. I don't know what your objection is.

MS. MAGAN: I was objecting because I thought I heard you say that he was not here legally.

MR. MAHAR: He stated he was illegal when he came in. He wasn't legalized until 1991. That's a year after the accident. He said it in his deposition.

MS. MAGAN: That's untrue.

MR. MAHAR: I'll read it to you, Judge.

THE COURT: I don't want to listen --

MR. MAHAR: She opened the door. I'll drop it.

MS. MAGAN: Your Honor, at this time -- and perhaps this is a problem because we didn't have our motion in limine before we brought in the jury, and I'm sorry for that, but I would like to object to any reference that Mr. Gallego came to the United States illegally.

THE COURT: Does it matter, just because she mentioned it?

MS. MAGAN: It's whether or not he was legal at the time he was injured.

THE COURT: Does it make a difference?

MS. MAGAN: I think it's awfully prejudicial.

THE COURT: The issue is whether he's here legally.

MR. MAHAR: Why did she even bring it up? I wouldn't have done anything about it, but she brought it up.

THE COURT: Go on to something else. It's not going to be in the charge. It isn't relevant to these people. I may correct it with an instruction.

MR. MAHAR: Okay.

(In the presence of the jury)

MR. MAHAR: Ladies and gentlemen, here basically is what you've heard the first part of the story concerning Mr. Gallego, and about basically -- I didn't hear that much about the accident. I heard he fell off the ladder. That's what his lawyer told you. And, of course, what we say, you can take it with a grain of salt -- and how everyone thinks about lawyers that's probably how you take it anyway -- but basically what happened at least our contentions are that if Mr. Gallego and I use the word "if" and I'll tell you about that in a minute, if he sustained an injury on-the-job, he was not hurt, and I'll tell you what I believe the evidence will show, but I think what the evidence will show will be the following: Number one, Mr. Gallego alleges an injury under very suspicious circumstances. We're going to have some witnesses from the employer who you've already heard is not a party to this lawsuit, who were there so shortly after the accident as to

APPENDIX E

Mr. Gallego needing a passport, and that's also untrue.

THE COURT: What's the relevance of that?

MS MAGAN: It's not true.

THE COURT: So what? It isn't going to be an issue in this case.

MR. MAHAR: And it's inflammatory.

MS. MAGAN: At this time, your Honor, I would like to ask that you instruct the jury that Mr. Gallego was here and was working legally. I have proof of that for you.

THE COURT: I am not going -- I am not an immigration judge. I am not about to sit here and determine whether the man was here legally or illegally. I will tell them that they're not to consider it when we get to the charge, but I'm looking at the proposed charge, and I don't see any issues in here about whether a question to the jury about whether he was here legally or illegally. It's not here.

MS. MAGAN: I'll ask the question of Mr. Gallego, and you may instruct that at the charge conference.

THE COURT: So you understand if you're going to ask him questions about whether he's here legally or illegally that opens the door to that whole issue. It doesn't open it to this because I'm not going to let you bootstrap it by asking that question, but if you want to ask him that, you can cross-examine him on the issue. It's up to you. I don't see its relevance, but you go ahead.

APPENDIX F

NO. 91-5785

JOSE ORLANDO GALLEGO	§	IN THE DISTRICT
	§	COURT OF HARRIS
VS.	§	COUNTY, TEXAS
	§	295TH DISTRICT
SERVICE LLOYDS INSURANCE	§	COURT
CO.	§	

PLAINTIFF'S MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW **Jose Orlando Gallego, Plaintiff**, and moves this Court to set aside the judgment rendered on the twelfth day of May, 1994 in the above-styled and numbered cause and to order a new trial, and in support shows as follows:

I. POINTS OF ERROR RE: STATEMENTS MADE DURING VOIR DIRE

A. General Background

This is a workers' compensation case in which Plaintiff sued for workers' compensation benefits for those injuries he sustained when he fell from a ladder at work. The Defendant refused to pay him any workers' compensation benefits because, among other excuses, "statements from co-workers indicate claimant was to be deported to Columbia."[1]

---

[1] Plaintiff's libel and slander suit is still pending.

At the time of his injury, Plaintiff was here legally; he was a legal resident alien who was married to a United States citizen and was *not* going to be deported to Columbia. A true and correct copy of Plaintiff's Resident Alien card is attached as Exhibit A, and was received directly from the Defendant's attorney in response to a discovery request in which the Plaintiff had asked for a copy of Plaintiff's personnel file.

Plaintiff is a Columbian; a slight, dark-skinned, man with so heavy an accent that it is difficult to understand him, except through an interpreter. Plaintiff spoke through an interpreter throughout the trial, and an interpreter was present to translate all that was said during voir dire. During voir dire, Defendant's attorney made the following statement to the veniremembers:

> Now, to clear up one thing that was brought up in voir dire that is not quite correct that I want to tell you about it now, I'll ask you about it later, it involves bias and prejudice. Mr. Gallego at the time of the accident was not in the country legally, nor had he been here some years before.

See Statement of Facts, a true and correct copy of which is attached to this motion as Exhibit B.

B. Points of Error

1. The Defendant's attorney engaged in incurable jury argument when he falsely stated that Plaintiff, at the time he sustained the on-the-job injuries for which he was suing, was in the country illegally. Besides the falsity of the statement, the attorney's statement that Plaintiff was working in the United States illegally and was suing for injuries he received as an illegal alien, and, by implication, at a job that should

have gone to a United States citizen, was so prejudicial as to be incurable.

2. The trial court erred in allowing the attorney for the Defendant to tell the jury as an officer of the Court that "Mr. Gallego at the time of the accident was not in the country legally, nor had he been here some years before" without correction and after objection by Plaintiff's attorney because such a statement, in addition to its patent falsity, was so prejudicial, especially since made by an officer of the Court, that it amounted to prejudicial error that denied Gallego his right to a fair trial.

3. The trial court erred in allowing the attorney for the Defendant to tell the jury as an officer of the Court that "Mr. Gallego at the time of the accident was not in the country legally, nor had he been here some years before" without correction and after objection by Plaintiff's attorney because such a statement, in addition to its patent falsity, was so prejudicial, especially since made by an officer of the Court, that it amounted to prejudicial error that probably led to the rendition of an improper verdict.

4. The trial court erred in failing to instruct the jury *not* to consider the false statement by the attorney for the Defendant who told the jury as an officer of the Court that "Mr. Gallego at the time of the accident was not in the country legally, nor had he been here some years before" because such a statement, in addition to its patent falsity, was so prejudicial, especially since made by an officer of the Court, as to amount to prejudicial error that denied Gallego a fair trial and probably led to the rendition of an improper verdict.

5. The trial court erred in refusing to either correct or instruct the jury *not* to consider the false statement by the

attorney for the Defendant who told the jury as an officer of the Court that "Mr. Gallego at the time of the accident was not in the country legally, nor had he been here some years before" by assuming and, thus, implicitly finding that such a false remark "isn't relevant to these people" because such a statement, in addition to its patent falsity, was so prejudicial, especially since made by an officer of the Court, as to amount to prejudicial error that denied Gallego a fair trial and probably led to the rendition of an improper verdict.

6. The Defendant's attorney's false statement as an officer of the Court that "Mr.Gallego at the time of the accident was not in the country legally, nor had he been here some years before" amounted to improper outside influence on the jury, which misconduct injured Plaintiff.

7. The trial court erred in overruling Plaintiff's motion for a mistrial based on the Defendants' attorney's prejudicial and false statement that "Mr. Gallego at the time of the accident was not in the country legally, nor had he been here some years before" because the attorney's statement that Plaintiff was working in the United States illegally and was suing for injuries he received as an illegal alien, and, by implication, at a job that should have gone to a United States citizen, was so prejudicial and inflammatory that an instruction to the jury to disregard it would not have eliminated the harm of the argument.

II. POINTS RE: RULINGS ON EVIDENCE

8. The trial Court abused its discretion in excluding more detailed testimony related to Plaintiff's immigration status at the time of his injury as "not relevant," especially in light of the false statements made by Defendant's attorney, an officer of the Court, concerning Plaintiff's immigration status and illegality at the time of the injury, which was

offered by Plaintiff to rebut the prejudicial effect of the Defendant's attorney's false statements because such evidence was admissible, and its exclusion was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment.

9. The trial Court abused its discretion in excluding the Defendant's "Controversion of Claim" which stated:

> CARRIER DENYING CLAIM AS BEING COMPENSABLE. INVESTIGATION REVEALS THERE WERE NO WITNESSES TO ALLEGED INJURY. STATEMENTS FROM CO-WORKERS INDICATE CLAIMANT WAS TO BE DEPORTED TO COLOMBIA. INVESTIGATION ALSO FAILS TO SUPPORT CLAIMANT'S VERSION OF HOW

APPENDIX G

No. 01-94-00883-CV

IN THE
FIRST COURT OF APPEALS
at Houston, Texas

Jose Orlando Gallego,
Appellant,
VS.
Service Lloyds Insurance Company,
Appellee.

Appealed from the 295th District Court of
Harris County, Texas

APPELLANT'S BRIEF

E. Casey Magan
Jensen & Magan, P.C.
SBT No. 12809800
440 Louisiana, Suite 1210
Houston, Texas 77002
Telephone: 713/223-4222
Fax Number: 713/237-8818

Attorney for Appellant,
Jose Orlando Gallego.

ORAL ARGUMENT REQUESTED

BRIEF OF ARGUMENT (POINTS 4-6)

POINT OF ERROR FOUR
(Restated)

The trial court erred in failing to grant appellant's motion for mistrial on the grounds of improper jury argument because the probability that appellee's argument caused harm is greater than the probability that the verdict was grounded upon proper proceedings and evidence and constituted reversibly harmful error.

POINT OF ERROR FIVE
(Restated)

The trial court erred in failing to grant appellant's motion for new trial on the grounds of incurable jury argument because appellee's argument was so prejudicial and inflammatory that an instruction to the jury to disregard it would not have eliminated the harm of the argument.

POINT OF ERROR SIX
(Restated)

The trial court erred in failing to grant either appellant's motion for mistrial or for new trial on the grounds of incurable jury argument because appellee's argument was so prejudicial and inflammatory that it denied appellant his right to a fair trial.

STATEMENT OF FACTS
FOR POINTS OF ERROR FOUR, FIVE, AND SIX

Mr. Gallego came to the U.S. from Columbia [Vol. 2 S.F. 41]. Although he can speak and read English, he has a very heavy accent and he exercised his right to utilize the

services of an interpreter at trial because he sometimes has problems understanding everything, and he wanted to make sure he understood. [Vol. 2 S.F. 35]. He is married to Elaine, a United States citizen, and they have been married since 1984. At the time of his injury, he was documented and working legally for Joe Meyers Mitsubishi. [Vol. 2 S.F. 36]. These facts were elicited only after Service Lloyds made the following improper argument during jury selection:

> Now, to clear up one think that was brought up in voir dire that is not quite correct that I want to tell you about it now, I'll ask you about it later, it involves bias and prejudice. Mr. Gallego at the time of the accident was not in the country legally, nor had he been here some years before. [Vol. 1 S.F. 42-43].
>
> Counsel's statement was untrue.

At the time of his injury, Gallego was properly documented; he was a legal resident alien who was married to a United States citizen. [Vol. 2 S.F. 36]. A copy of Gallego's employment authorization card was received by Gallego directly from Service Lloyds' attorney in response to a discovery request in which Gallego had asked for a copy of his personnel file at Joe Meyers Mitsubishi [Tr. 58, 66, 67].

Immediately after the improper statement was made, counsel for Gallego objected to the statement on grounds that it was false and prejudicial. [Vol. 1 S.F. 43-44]. The Court stated that Gallego's status at the time of his injury was not relevant and that he might correct it with an instruction. [Vol. 1 S.F. 44]. Gallego sought a mistrial on the improper argument and an instruction. The Court denied the motion for mistrial and stated he would deal with the instruction at the end of the trial [Vol. 1 S.F. 73-74]. The Court later

denied Gallego's motion for new trial made partly on those grounds. [Tr. 58, 79].

ARGUMENTS AND AUTHORITIES FOR POINTS OF ERROR FOUR, FIVE, AND SIX

A. Curable vs. Incurable Jury Argument

The Law

1. Curable Argument

To obtain a reversal of a judgment based upon improper, but curable, jury argument, the appellant must prove (1) an error, (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, (4) that was not curable by an instruction, by a prompt withdrawal of the statement, or by a reprimand by the judge, and (5) the argument, by its nature, degree, and extent, constituted reversibly harmful error, including (6) the argument's probable effect on a material holding. *Standard Fire Insurance Co. v. Reese*, 584 S.W.2d 835, 839-40 (Tex. 1979). The reviewing court must determine if the probability that the improper argument caused the harm is greater than the probability that the verdict was based upon proper proceedings and evidence. *Id.* at 839-40; *In re W.G.W., a Child*, 812 S.W.2d 409, 416 (Tex. App. -- Houston [1st Dist.] 1991, no writ).

The improper jury argument must be evaluated in light of the whole case, beginning with voir dire and ending with closing argument. The test is whether a juror of ordinary intelligence could have been persuaded by the argument to agree to a verdict contrary to that to which he would have agreed but for such argument. *Gannett Outdoors of Texas v. Kubeczka*, 710 S.W.2d 79, 86 (Tex. App. -- Houston [14th Dist.] 1986, no writ).

2. Incurable Argument

In contrast to a curable jury argument, objection is not required in the case of incurable jury argument, which is argument so inflammatory that its harmful or prejudicial nature cannot be cured by an instruction to disregard. *Texas Employers Insurance Association v. Puckett*, 822 S.W.2d 133, 135 (Tex. App. -- Houston [1st Dist.] 1991, writ denied); *see also In re W.G.W., A Child*, 812 S.W.2d at 416. The test for reversal is whether the argument, viewed in light of the entire record, was reasonably calculated to cause such prejudice to the opposing party that an instruction by the court would not eliminate the probability that an improper verdict was rendered. *Howard v. Faberge, Inc.*, 679 S.W.2d 644, 649 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Gallego contends that the false statement made by Service Lloyds' attorney during voir dire was so prejudicial, that it was reasonably calculated to cause, and probably did cause, the rendition of an improper verdict in this matter, and that no instruction by the Court could have eliminated the prejudicial effects of a statement made by an officer of the Court in the first minutes of trial.

If the challenged argument is found by this Court not to be incurable, then Gallego would alternatively argue that the argument complained of constituted reversible error in that a juror of ordinary intelligence could have been persuaded by the argument to agree to a verdict contrary to that to which he would have agreed but for such argument.

B. Counsel's Argument Was Incurable

There can be no reasonable dispute that the issue of illegal aliens permeates our social agendas, governmental

debates, and newspaper editorials. Debate centers around benefits to be provided or withheld on the basis of illegality, a person's failure to follow the law as the basis for the denial of benefits, and the often-cited claim that illegal aliens take away jobs that would otherwise be held by law-abiding persons.

With this backdrop, Mr. Gallego was involved in a trial for workers' compensation where he had to prove that he received an injury in the course of his employment. Counsel's statement that Gallego was working "illegally" functioned as the ultimate form of impeachment, shrouding everything else Gallego said at trial with suspicion and possibly ill-will -- even though it was false. No testimony by Gallego could have effectively rebutted a false statement made by an officer of the court who had, with his false statement, effectively accused him of a crime. No instruction could have effectively cured the inflammatory and prejudicial effect of the untruth.[7] *See Hewitt v. Buchannan*, 4 S.W.2d 168, 178-179 (Tex. Civ. App. -- Eastland 1927, no writ) (reversible error where counsel's argument amounted to an accusation of trying to defraud the government invasion of a supposed law that did not exist.)

C. REVERSIBLE JURY ARGUMENT

Should the Court find that counsel's statement does not amount to plain error, Gallego would show, pursuant to the test first enunciated by The Texas Supreme Court in *Reese*:[8]

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[7] Service Lloyds was undoubtedly aware of the untruth, as it had been sued for libel and slander for making other false statements about Gallego's legal status during the time of his injury. [Tr. 13-14].

[8] 584 S.W.2d at 839-840.

(1) The statement was clearly error because it was not true and was outside the record;

(2) it was not invited, and there is no evidence in the record to justify the statement;[9]

(3) proper objection was made to the statement, and a motion for mistrial was urged and overruled [Vol 1 S.F. 43-44, 73-74];

(4) the statement was not curable by an instruction. An instruction to disregard could not have cured the error, and may have contributed to the statement's prejudicial effect. By instructing the jury to disregard, the jury would have been left with the impression that indeed, Jose Gallego was illegal when he was injured at work, but that such a 'fact'

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[9] Service Lloyds claims that the statement was invited by Gallego's counsel during voir dire when she stated:

> We have Ray...O'Canas here to interpret for [Gallego]. Mr. Gallego is here legally, but I'd like to know whether or not that's going to have an affect on anybody, not just the fact that he's an Hispanic seeking recovery under the laws of the United States of America -- which he's here legally for -- but whether or not it's going to bother anyone. It's going to slow things down because I'm going to ask a question, the interpreter is going to translate for Mr. Gallego, then he's going to answer in Spanish. Then it will come back to us in English. Will anyone have a problem with that? [Vol. 1 SF 30-31].

In this regard it would seem clear that an untruth cannot be "invited". Gallego's counsel furthermore had the right to question the panel regarding any possible prejudice against her client, a Columbian who was using an interpreter to state his case. *See e.g., Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App. -- Houston [14th Dist.] 1993, writ denied) (voir dire statements and questions of counsel for resident alien to ascertain whether prospective jurors were biased or prejudiced in favor of or against defendant because of his nationality, wealth and status were within the scope of proper voir dire examination).

was merely irrelevant to their considerations;

(5) the statement affected a material issue in the case. No issue was found in favor of Gallego, probably as a result of the jury's consideration of the inflammatory statement. It seems most probable that the jury could have found "no injury" based upon Gallego's alleged illegal status at the time of the injury.

The statement's prejudicial effects were exacerbated by counsel for Service Lloyd's frequent attacks on Gallego's right to use an interpreter:[10]

> (Counsel's statement, again during voir dire):
> I think the evidence will show that on a benefit of the doubt when some person -- by the way, Mr. Gallego does speak English. He understood me at his deposition. [Vol. 1 S.F. 45]
>
> (Counsel's questioning of defense witness):
> "Does he speak English, could he understand you?"
> "Yes."
> "You're sure?"
> "Yes."
> "Had you spoken to him in English before?"

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[10] After the statements made in voir dire, Gallego addressed his reasons for using the interpreter:

Magan:	Mr. Gallego, do you speak any English?
Gallego:	Yes
Magan:	Why are you using an interpreter during this trial?
Gallego:	Because I have problems, things that I don't understand, and I wanted to make sure that I would understand everything. [Vol. 2 S.F. 35].

"Yes".
[Vol. 2 S.F. 93-94].

(Counsel questioning of another defense witness):
"Did Jose Gallego speak English?"
"Yes, sir."
[Vol. 2 S.F. 99].

D. Conclusion Re: Improper Argument

The argument was improper, inflammatory and prejudicial in the extreme. It clearly imputed dishonesty to the plaintiff and was an appeal to prejudice and passion and was reasonably calculated to cause, and probably did cause, the jury to render an improper verdict. The reference that Gallego was illegal at the time he was injured is unsupported in the record, is prejudicial, and denied him his right to a fair trial: one that was working here "illegally" when he was hurt is not "equal before the law" to law abiding citizens and jurors. The statement injected prejudice into a case where the jury would probably not have reached the same conclusion from the evidence without regard to the argument about which Gallego complains. The judgment should therefore be reversed, and the cause remanded for a new trial.[11]

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[11] Other cases involving improper argument with regard to citizenship or nationality which were found incurable are: *Texas Employers Insurance Association v. Guerrero*, 800 S.W.2d 859, 862-863 (Tex. App.-- San Antonio 1990, writ denied)(where San Antonio case was tried by an Hispanic lawyer for an Hispanic client in front of a jury, the majority of whom were Hispanic, the repeated statements of counsel of the need to "unite" and "stick together" were found to be incurable and reversibly harmful); *Texas Employers Insurance Association v. Jones*, 361 S.W.2d 725, 727 (Tex. Civ. App. -- Austin 1962, writ ref'd n.r.e.)(counsel's reference during closing to one of plaintiff's treating physician as "He is an old hand at the job, that Jew is "held to be

CONCLUSION AND PRAYER

For all of the reasons stated in this brief, appellant Galiego asks this Court to sustain his legal sufficiency points of error and (1) render judgment for him on the sole issue that he received an injury in the course of his employment on June 15, 1990 (Point of Error 1), and remand the remainder of the issues for a new trial, or (2) render judgment for him on the entire case (Point of Error 2) based on his conclusive evidence and proof of each element in this Workers' Compensation case as a matter of law.

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incurable and reversible error); *Penate v. Berry*, 348 S.W.2d 167, 168 (Tex. Civ. App. -- El Paso 1961, writ ref'd n.r.e.) (statement of defense counsel in case between an auto and an alien motorcyclist that "in this country [an alien] can't come into court and reach [his] hands into the pockets of an American citizen and take his property from him" found to be reversible error where the jury's findings against plaintiff were not supported by the evidence but were rather the probable result of the improper argument); *Texas Employers v. Haywood*, 266 S.W.2d 856, 858-859 (1954) (counsels' reference to plaintiff's witnesses as "yellow nigs" with the statement that he could have had white persons testify, was so prejudicial that its harmfulness could not have been eliminated by either a retraction or instruction or both, and was reversible error); *Basanez v. Union Bus Lines*, 132 S.W.2d 432, 432-433 (Tex. App. -- San Antonio 1939, no writ) (comparing the defendant as a citizen of the U.S. who pays taxes with the plaintiff who "I don't know whether he waded that river or swam ... you are not going to expropriate $25,000 from one of our citizens" was found to be incurably prejudicial); *Rojas v. Richardson*, 703 F.2d 186, 192 (5th Cir. 1983) (reference in closing argument to plaintiff as an illegal alien, which was not supported by the record and which was irrelevant to negligence claims constituted plain error and was reversible) (*on rehearing*, 713 F.2d 116, 118, Court found that, although closing argument referring to plaintiff as an "illegal alien" was highly prejudicial and a blatant appeal to jury bias, in the absence of an objection, the argument was not so prejudicial as to constitute "plain error").

In the alternative, Mr. Gallego asks this Court to sustain his factual sufficiency challenge (Point of Error 3), and remand this case for a new trial on the ground that the jury's verdict is against the great weight and preponderance of the evidence and is clearly wrong and unjust.

As a further alternative, Mr. Gallego asks this Court to reverse the verdict of the jury and the judgment of the trial court based upon improper statements made by counsel for Service Lloyds during jury selection, and remand this cause for further proceedings. TEX. R. APP. P. 81(c).

APPENDIX H

No. 01-94-00883-CV

IN THE
FIRST COURT OF APPEALS
at Houston, Texas

Jose Orlando Gallego,
Appellant,

VS.

Service Lloyds Insurance Company,
Appellee.

Appealed from the 295th District Court of
Harris County, Texas

APPELLANT'S MOTION FOR REHEARING

E. Casey Magan
Jensen & Magan, P.C.
SBT No. 12809800
440 Louisiana, Suite 1210
Houston, Texas 77002
Telephone: 713/223-4222
Fax Number: 713/237-8818

Attorneys for Appellant,
Jose Orlando Gallego.

ORAL ARGUMENT IS REQUESTED

cured the falsity when he testified that he *was* in the United States legally and was properly authorized and documented to work. Perhaps it is true that his testimony alone could have cured the error; but such a conclusion assumes that the jury believed him. Counsel's statement that Gallego was working "illegally" functioned as the ultimate form of impeachment, shrouding everything Gallego said at trial with suspicion and probable ill-will -- even though it was false. No testimony by Gallego could have effectively rebutted a false statement made by an officer of the court who had, with his false statement, effectively accused him of being a criminal. No instruction could have effectively cured the inflammatory and prejudicial effect of the untruth. *See, e.g.*, *Hewitt v. Buchannan*, 4 S.W.2d 168, 178-179 (Tex. Civ. App. -- Eastland 1927, no writ) (reversible error where counsel's argument amounted to an accusation of trying to defraud the government in evasion of a supposed law that did not exist.)

C. THE FALSITY WAS THE BASEST OF APPEALS TO BIAS AND PREJUDICE

The Court of Appeals has held that the statement complained of was "less offensive than appeals to racial, religious, or national prejudice that have previously been held to be incurable." *Opinion*, p. 11.

The statement was untrue, it was wholly outside of the record and it falsely accused Gallego of being *illegal* when he was injured, effectively branding him a criminal without due process of law, and continues to be made during a time when public passions and prejudices against illegal aliens run deep. The statement was made by an officer of the court and is nothing but offensive.

D. DEPRIVATION OF DUE PROCESS AND EQUAL PROTECTION

The argument was improper, inflammatory and prejudicial in the extreme. It clearly imputed dishonesty to Gallego, was an appeal to prejudice and passion and was reasonably calculated to cause, and probably did cause, the jury to render an improper verdict. The reference that Gallego was not in the country legally, and the implication that he was an illegal alien at the time he was injured is unsupported in the record, is prejudicial, and denied him his right to a fair trial because one that was working here "illegally" when he was hurt is not "equal before the law" to law abiding citizens and jurors.

If Gallego had been an illegal alien at the time he was injured, he could have asked the Court to prevent the mention of his status during the course of the trial in a Motion in Limine. But because (1) he was in the country legally at the time of the accident; (2) the appellee knew, because of the pending libel suit, that Gallego was in the country legally at the time of the accident, and (3) appellee had possession of, and had provided a copy of, Gallego's work authorization card which proved he was in the country legally at the time of the accident, such a request was not made. On the other hand, Gallego could not have asked the Court to prevent opposing counsel from lying about his legal status at the time of his injury since such conduct is hardly to be anticipated.

Gallego was accused of being a criminal when he was branded *illegal* by Service Lloyds' attorney. He was labeled a criminal without the benefit of due process and merely because his race, nationality, language and appearance made him seem so. He was thus denied equal protection under the law, and his right to what should have been a fair trial,

solely because he was a Columbian using an interpreter.[3] Gallego was clearly an alien. The attorney's false statement made him an *illegal* alien.

The statement injected prejudice into a case where the jury would probably not have reached the same conclusion from the evidence without regard to the argument about which Gallego complains. The probable effect on any material finding in this workers' compensation case was profound. *See Standard Fire Insurance Co. v. Reese*, 584 S.W.2d 835 (Tex. 1979). Gallego was the only witness to his injury; thus his credibility was of the highest importance. When he was effectively branded a criminal by an officer of

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[3] Mr. Gallego testified that although he spoke English, he was using an interpreter at his trial "Because I have problems, things that I don't understand, and I wanted to make sure that I would understand everything." [Vol. 2 S.F. 35]. The challenged statement's prejudicial effects were exacerbated by counsel for Service Lloyd's frequent attacks on Gallego's right to use an interpreter:

> (Counsel's statement, again during voir dire):
> I think the evidence will show that on a benefit of the doubt when some person -- by the way, Mr. Gallego does speak English. He understood me at his deposition. [Vol. 1 S.F. 45].
>
> (Counsel's questioning of defense witness):
> "Does he speak English, could he understand you?"
> "Yes."
> "You're sure?"
> "Yes."
> "Had you spoken to him in English before?"
> "Yes."
> [Vol. 2 S.F. 93-94].
>
> (Counsel's questioning of another defense witness):
> "Did Jose Gallego speak English?"
> "Yes, sir."
> [Vol. 2 S.F. 99].

the court, his credibility was impugned along with his character. Indeed, the jury found against Gallego on the very first question, and because the questions were predicated upon an affirmative finding, they answered no others.

The argument was reasonably calculated to, and probably did, cause the rendition of an improper judgment. The judgment should therefore be reversed, and the cause remanded for a new trial.

IV.
STATEMENT OF FACTS FOR POINTS OF ERROR ONE THROUGH SIX ON REHEARING

Gallego contended on appeal that he proved a work-related injury and damages as a matter of law and that, in the alternative, the jury's verdict was against the great weight and preponderance of the evidence and was clearly wrong and unjust.

The Court of Appeals overruled each point of error in its Opinion, issued April 13, 1995, and made certain statements which, to the appellant, seem to require a higher burden of proof for him and a certain class of litigants which is not required by the Workers' Compensation Act under which he sought recovery.

V.
ARGUMENTS AND AUTHORITIES FOR POINTS OF ERROR SEVEN THROUGH ELEVEN ON REHEARING

A. UNFAIR BURDEN OF PROOF

In considering and overruling Gallego's no evidence points of error, the Court of Appeals stated, "No testimony was presented from any medical expert; only medical records were presented." *Opinion*, p.2.

Such a consideration is unfair to Gallego as well as to an ever-growing class of litigants who, in order to keep the costs of litigation down, rely upon the statutory provision

APPENDIX I

No. _____

IN THE
SUPREME COURT
OF TEXAS

Jose Orlando Gallego,
Petitioner,
VS.
Service Lloyds Insurance Company,
Respondent.

Appealed from the First Court of Appeals
Harris County, Texas

Court of Appeals Cause No. 01-94-00883-CV

APPLICATION FOR WRIT OF ERROR

E. Casey Magan
Jensen & Magan, P.C.
SBT No. 12809800
440 Louisiana, Suite 1210
Houston, Texas 77002
Telephone: 713/223-4222
Fax Number: 713/237-8818

Attorneys for Petitioner,
Jose Orlando Gallego.

ORAL ARGUMENT REQUESTED

but such a conclusion assumes that the jury believed him. Counsel's statement that Gallego was working "illegally" functioned as the ultimate form of impeachment, shrouding everything Gallego said at trial with suspicion and probable ill-will -- even though it was false. No testimony by Gallego could have effectively rebutted a false statement made by an officer of the court who had, with his false statement, effectively accused him of being a criminal. No instruction could have effectively cured the inflammatory and prejudicial effect of the untruth. *See, e.g., Hewitt v. Buchannan*, 4 S.W.2d 168, 178-179 (Tex. Civ. App. -- Eastland 1927, no writ)(reversible error where counsel's argument amounted to an accusation of trying to defraud the government in evasion of a supposed law that did not exist.)

C. Falsity Is the Basest of Appeals to Bias and Prejudice

The Court of Appeals has held that the statement complained of was "less offensive than appeals to racial, religious, or national prejudice that have previously been held to be incurable." *Opinion*, p. 11.

The statement was untrue, it was wholly outside of the record and it falsely accused Gallego of being *illegal* when he was injured, effectively branding him a criminal without due process of law, and continues to be made during a time when public passions and prejudices against illegal aliens run deep. The statement was made by an officer of the court and is nothing but offensive.

D. Deprivation of Due Process and Equal Protection

The argument was improper, inflammatory and prejudicial in the extreme. It clearly imputed dishonesty to Gallego, was an appeal to prejudice and passion and was reasonably calculated to cause, and probably did cause, the

jury to render an improper verdict. The reference that Gallego was not in the country legally, and the implication that he was an illegal alien at the time he was injured is unsupported in the record, is prejudicial, and denied him his right to a fair trial because **one that was working here "illegally" when he was hurt is not "equal before the law" to law abiding citizens and jurors.** *See Rojas v. Richardson*, 703 F.2d 186 (5th Cir. 1983, *reh'g granted and judgment aff'd* 713 F.2d 116) (Both opinions are attached as Appendix C).

If Gallego had been an illegal alien at the time he was injured, he could have asked the Court to prevent the mention of his status during the course of the trial in a Motion in Limine. But because (1) he was in the country legally at the time of the accident; (2) the appellee knew, because of the pending libel suit, that Gallego was in the country legally at the time of the accident, and (3) appellee had possession of, and had provided a copy of, Gallego's work authorization card which proved he was in the country legally at the time of the accident, such a request was not made. On the other hand, Gallego could not have asked the Court to prevent opposing counsel from lying about his legal status at the time of his injury since such conduct is hardly to be anticipated.

Gallego was accused of being a criminal when he was branded *illegal* by Service Lloyds' attorney. He was labeled a criminal without the benefit of due process and merely because his race, nationality, language and appearance made him seem so. He was thus denied equal protection under the law, and his right to what should have been a fair trial,

solely because he was a Columbian using an interpreter.[5]

Mr. Gallego was clearly an alien. The attorney's false statement made him an *illegal* alien. Mr. Gallego was denied the rights afforded to him under the Constitutions of the State of Texas and of the United States.

The statement injected prejudice into a case where the jury would probably not have reached the same conclusion from the evidence without regard to the argument about which Gallego complains. The probable effect on any material finding in this workers' compensation case was

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[5] Mr. Gallego testified that although he spoke English, he was using an interpreter at his trial "Because I have problems, things that I don't understand, and I wanted to make sure that I would understand everything." [Vol. 2 S.F. 35]. The challenged statement's prejudicial effects were exacerbated by counsel for Service Lloyd's frequent attacks on Gallego's right to use an interpreter:

> (Counsel's statement, again during voir dire):
> I think the evidence will show that on a benefit of the doubt when some person -- by the way, Mr. Gallego does speak English. He understood me at his deposition. [Vol. 1 S.F. 45].
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> (Counsel's questioning of defense witness):
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>
> (Counsel's questioning of another defense witness):
> "Did Jose Gallego speak English?"
> "Yes, sir."
> [Vol. 2 S.F. 99].

profound. *See Standard Fire Insurance Co. v. Reese*, 584 S.W.2d 835 (Tex. 1979). Gallego was the only witness to his injury; thus his credibility was of the highest importance. When he was effectively branded a criminal by an office of the court, his credibility was impugned along with his character. Indeed, the jury found against Gallego on the very first question, and because the questions were predicated upon an affirmative finding, they answered no others.

The arguments was reasonably calculated to, and probably did, cause the rendition of an improper judgment. The judgment should therefore be reversed, and the cause remanded for a new trial.

APPENDIX J

No. 95-0613

IN THE
SUPREME COURT
OF TEXAS

Jose Orlando Gallego,
Petitioner,
VS.
Service Lloyds Insurance Company,
Respondent.

Appealed from the First Court of Appeals
Harris County, Texas

Court of Appeals Cause No. 01-94-00883-CV

MOTION FOR REHEARING

E. Casey Magan
Jensen & Magan, P.C.
SBT No. 12809800
440 Louisiana, Suite 1210
Houston, Texas 77002
Telephone: 713/223-4222
Fax Number: 713/237-8818

Attorneys for Petitioner,
Jose Orlando Gallego.

ORAL ARGUMENT REQUESTED

record and unsupported by any evidence, Service Lloyds' attorney destroyed Gallego's credibility, thus ensuring that the case was over before it had begun.

a. Due Course of Law (Due Process)

In addition to the patently unethical behavior of opposing counsel in knowingly making a false statement, Gallego was branded a criminal without due process of law. False statements and innuendoes have been found to be reversible error. *See, e.g., Hewitt v. Buchannan*, 4 S.W.2d 168, 178-179 (Tex. Civ. App. -- Eastland 1927, no writ) (reversible error where counsel's argument amounted to an accusation of trying to defraud the government in evasion of a supposed law that did not exist.) Gallego was thus deprived of the privileges and immunities to afforded to others who are hurt on the job in this state - the right not to be falsely accused as a criminal in a civil trial. U.S. CONST. AMEND. V, XIV; TEX CONST. ART. I § 19.

b. Equal Rights (Equal Protection)

The argument was improper, inflammatory and prejudicial in the extreme. It clearly imputed dishonesty to Gallego, was an appeal to prejudice and passion and was reasonably calculated to cause, and probably did cause, the jury to render an improper verdict. The reference that Gallego was not in the country legally, and the implication that he was an illegal alien at the time he was injured is unsupported in the record, is prejudicial, and denied him his right to a fair trial because **one that was working here "illegally" when he was hurt is not "equal before the law" to law abiding citizens and jurors.** *See Rojas v. Richardson*, 703 F.2d 186 (5th Cir. 1983, *reh'g granted and judgment aff'd* 713 F.2d 116) (Both opinions were attached as Appendix C to Gallego's original application.)

He was labeled a criminal without the benefit of due process and merely because his race, nationality, language and appearance made him seem so. He was thus denied equal protection under the law, and his right to what should have been a fair trial, solely because he was a Colombian utilizing the services of an interpreter.[1]

Mr. Gallego was clearly an alien. The attorney's false statement made him an *illegal* alien. He was thus denied equal protection under the law because "no greater burden should be laid upon one than are laid upon others in the same calling and conditions." *Barbier v. Connolly*, 5 S.Ct. 357, 113 U.S. 27 (1885). Indeed, merely because of

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[1] Mr. Gallego testified that although he spoke English, he was using an interpreter at his trial "Because I have problems, things that I don't understand, and I wanted to make sure that I would understand everything." [Vol. 2 S.F. 35]. The challenged statement's prejudicial effects were exacerbated by counsel for Service Lloyd's frequent attacks on Gallego's right to use an interpreter:

> (Counsel's statement, again during voir dire):
> I think the evidence will show that on a benefit of the doubt when some person -- by the way, Mr. Gallego does speak English. He understood me at his deposition. [Vol. 1 S.F. 45].
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> (Counsel's questioning of defense witness):
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> "Yes."
> [Vol. 2 S.F. 93-94].
>
> (Counsel's questioning of another defense witness):
> "Did Jose Gallego speak English?"
> "Yes, sir."
> [Vol. 2 S.F. 99].

Mr. Gallego's apparent ethnicity, he was readily understood to fall into a class of persons who could be illegal. Opposing counsel's statement took advantage of that fact and made him so.

All men are presumed to have equal rights in the eyes of the government, but by allowing the attorney to make a false charge of illegality, and then disallowing Mr. Gallego to offer more evidence to bolster the truth in front of a jury who would not - could not - believe one who they were told was a criminal, Mr. Gallego was denied equal protection under the law. U.S. CONST. amend. XIV; TEX CONST. Art. I, § 3.

c. Right of Trial by Jury (Right to a Fair Trial)

Mr. Gallego was similarly denied his right to a trial by jury. U.S. CONST. amend. VII; XIV; TEX CONST. art. I,, § 15.

The right to a trial by jury means, of course, the right to a trial by an impartial jury. *See Pierson v. State*, 18 Tex. App. 524 (1885). The false statement that branded Gallego an illegal alien ensured that the jury would not be fair and impartial. Remember, that on or about the time of this trial came the ubiquitous debate surrounding the overwhelming popularity of California's Proposition 187, the tax-supported increase in border patrols in this state and other border states, as well as proposed federal mandates and newspaper editorials about persons that are in our country illegally and the benefits to which they should or should not be entitled under our laws. Even toady, a candidate for President of the United States is rallying crowds with his ideas on building walls across our borders! No one can seriously argue that the debate surrounding illegal aliens was

not on the mind of every citizen juror at the time this case was heard.

The statement injected prejudice into a case where the jury would probably not have reached the same conclusion from the evidence without regard to the argument about which Gallego complains. The probable effect on any material finding in this workers' compensation case was profound. *See Standard Fire Insurance Co. v. Reese*, 584 S.W.2d 835 (Tex. 1979). Gallego was the only witness to his injury; thus his credibility was of the highest importance. When he was effectively branded a criminal by an officer of the court, his credibility was impugned along with his character. Indeed, the jury found against Gallego on the very first question, and because the questions were predicated upon an affirmative finding, they answered no others.

The argument was reasonably calculated to, and probably did, cause the rendition of an improper judgment. The judgment should therefore be reversed, and the cause remanded for a new trial.

III.
CONCLUSION AND PRAYER

Because we share the borders with Mexico, many of the persons who seek redress in this State's courts are aliens - legal and illegal. This matter is certainly of utmost importance to the jurisprudence of this State to require correction.

For all of the reasons stated in this brief, Mr. Gallego asks this Court to grant this application for writ of error, set this case for oral argument, and after argument, reverse the verdict of the jury and the judgment of the trial court based

upon improper statements made by counsel for Service Lloyds during jury selection, and remand this cause for further proceedings. TEX. R. APP. P. 81(c). In the alternative, Mr. Gallego asks this Court to reconsider and sustain the legal sufficiency points of error and render judgment for them. In the further alternative, Mr. Gallego asks this Court to sustain his factual sufficiency challenge, and remand this case for review consistent with the law.

APPENDIX K

No. 95-0613

IN THE
SUPREME COURT
OF TEXAS

Jose Orlando Gallego,
Petitioner,
VS.
Service Lloyds Insurance Company,
Respondent.

Appealed from the First Court of Appeals
Harris County, Texas

Court of Appeals Cause No. 01-94-00883-CV

REPLY TO RESPONSE TO PETITIONER'S MOTION FOR REHEARING

E. Casey Magan
Jensen & Magan, P.C.
SBT No. 12809800
440 Louisiana, Suite 1210
Houston, Texas 77002
Telephone: 713/223-4222
Fax Number: 713/237-8818

Attorneys for Petitioner,
Jose Orlando Gallego.

ORAL ARGUMENT REQUESTED

No. 95-0613

IN THE
SUPREME COURT
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Jose Orlando Gallego,
Petitioner,
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Appealed from the First Court of Appeals
Harris County, Texas

Court of Appeals Cause No. 01-94-00883-CV

REPLY TO RESPONSE TO PETITIONER'S MOTION FOR REHEARING

TO THE SUPREME COURT OF TEXAS:

Petitioner, Jose Orlando Gallego, submits this Reply to Respondent's Answer to Petitioner's Motion for Rehearing and respectfully shows as follows:

By way of introduction, Petitioner seeks a Rehearing on the following Point of Error:

The Supreme Court erred in denying the application because Service Lloyds' attorney's untrue assertion to the jury panel that Mr. Gallego "was not in the country legally" at the time of his workers' compensation injury was so prejudicial and inflammatory that it denied Mr. Gallego his right to

> a fair trial and deprived him of due process and equal protection under the law as guaranteed him under the Constitution of the State of Texas and the United States, and constitutes reversibly harmful error. *Petitioner's Motion for Rehearing*.

In answer to Petitioner's Motion for Rehearing, which was predicated upon error that was made by the Respondent's attorney's false and prejudicial statement during jury selection,[1] Respondent's attorney <u>again</u> makes an untrue statement - this time to the highest court in the State of Texas; to the justices of the Supreme Court of Texas.

Petitioner, therefore, cannot let this violation go unanswered, and with the greatest caution, files this Reply lest the transgression again go unnoticed.

II.

On page three of its Answer to Petitioner's Motion for Rehearing, Respondent, through its attorney, makes the following ***untrue*** statement to the Supreme Court of Texas:

> As the Court of Appeals noted in their Opinion, the petitioner gave sworn deposition testimony that he was not a legal resident until 1991. *Opinion, p. 11,*

---

[1] The entire statement reads:

> Now, to clear up one thing that was brought up in voir dire that is not quite correct that I want to tell you about it now, I'll ask you about it later, it involves bias and prejudice. **Mr. Gallego at the time of the accident was not in the country legally**, nor had he been here some years before [Vol. 1 S.F. 42-43] (emphasis added).

Fn 3. [2]

The truth of this statement is readily contradicted by the First Court of Appeals' Opinion which state only that "Service Lloyds' response to the motion for new trial contains Gallego's deposition testimony that he obtained 'residence status' in 1991, after these events occurred." *Opinion*, p. 11.

NOWHERE IN THE OPINION DOES THE COURT OF APPEALS NOTE THAT THE PETITIONER GAVE SWORN DEPOSITION TESTIMONY THAT HE WAS NOT A LEGAL RESIDENT UNTIL 1991. Nowhere in the page of deposition testimony so heavily relied upon by Respondent, which appears only as an attachment to Defendant's Response to Plaintiff's Motion for New Trial, does Mr. Gallego state that he was not a legal resident until 1991. Respondent cannot rely on a statement that was never made in an effort to continue to disingenuously skirt the issue of a prejudicial falsehood.

Because the other points urged, and re-urged by Respondent are predicated upon his alleged "justified belief" that Mr. Gallego was illegal at the time he was hurt, which Petitioner has shown time and again to be patently false, they cannot in good faith be taken seriously. Mr. Gallego has already fully briefed his arguments respecting invited error, curable error prejudicially harmful and reversible error under this Court's analysis in *Standard Fire Insurance Co. v. Reese*, 584 S.W.2d 835 (Tex. 1979) and appellate court cases, *see, e.g. Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App. -- Houston [14th Dist.] 1993, writ denied), and respectfully asks the Court to refer to Points 1 through 3 of

---

[2] Respondent's Answer to Petitioner's Motion for Rehearing, p. 3.

his Brief in the Court of Appeals, as well as Points of Error 1 through 6 of his Application for Writ of Error filed here.

III.

Another point again re-urged by Respondent is that Petitioner's counsel, by referring to her client as a Colombian, as Hispanic [sic], and as Spanish-speaking, allowed Respondent's counsel to lie to the jury panel and state that, at the time of the injury [the injury for which he was now seeking compensation in a Texas State District Court], Mr. Gallego was in the country illegally.

The point complained about on appeal **IS NOT** that Respondent's attorney made reference to Mr. Gallego as an alien, but that Respondent's attorney falsely stated that Mr. Gallego was an ILLEGAL alien. There is the rub: a corrupt and prejudicial statement, indeed, made worse by its repetition without apology and its defenseless defense.

IV.

The argument was reasonably calculated to, and probably did, cause the rendition of an improper judgment, and has deprived, and continues to deprive Mr. Gallego the rights guaranteed him under the Constitutions of this State, and the United States of America. The error, therefore, should not go uncorrected.

Mr. Gallego respectfully asks this Court to rehear his application for writ of error, and, upon such rehearing, to grant his application for writ of error and set this matter for oral argument, and after argument, reverse the verdict of the jury and judgment of the trial court and remand this matter for further proceedings. In the alternative, Mr. Gallego asks this Court to reconsider and sustain his legal sufficiency

points of error and render judgment for them, and, as further alternative, Mr. Gallego asks this Court to sustain his factual sufficiency challenge and remand this case for review consistent with the law.

Respectfully submitted,

By: /s/ E. Casey Magan
E. Casey Magan, #12809800
Jensen & Magan, P.C.
440 Louisiana, Suite 1210
Houston, Texas 77002
Telephone: 713/223-4222
Telefax : 713/237-8818
Attorney for Appellant,
Jose Orlando Gallego

NOTICE OF FILING AND CERTIFICATE OF SERVICE

You are hereby provided with notice, pursuant to Texas Rules of Appellate Procedure 4(g), that Petitioner has filed the above and foregoing *Reply to Answer to Petitioner's Motion for Rehearing* and have served a copy of said *Reply* on Edward J. Mahar, attorney of record for Respondent, Service Lloyds Insurance Company, by delivery of a true copy of said *Application* by Certified Mail, Return Receipt Requested, by depositing the same, postpaid, in an official depository under the care and custody of the United States Postal Service on this 27th day of March, 1996, enclosed in a wrapper properly addressed as follows:

Edward J. Mahar
Law Offices of Edward J. Mahar
3401 Louisiana, Suite 260
Houston, Texas 77002-9547
Telephone Number: 713/523-2914
Fax Number: 713/ 529-6612

/s/ E. Casey Magan
E. Casey Magan
Attorney for Petitioner, Jose Gallego

(2)

Supreme Court, U.S.
FILED
JUL 29 1996
CLERK

96-114

No._____

IN THE
Supreme Court of the United States
OCTOBER TERM 1995

JOSE ORLANDO GALLEGO,
Petitioner,

v.

SERVICE LLOYDS INSURANCE COMPANY
Respondent.

Brief in Opposition to Petition for Writ of Certiorari To The Court of Appeals For The First District of Texas

BRIEF IN OPPOSITION

EDWARD J. MAHAR
Attorney of Record
LAW OFFICES OF
EDWARD J. MAHAR, P.L.L.C.
3401 Louisiana, Suite 260
Houston, TX 77002-9547
(713) 523-2914
(713) 529-6612 (fax)

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STATEMENT OF THE CASE

On June 15, 1990, Mr. Gallego ("Gallego") made a claim for worker's compensation, claiming that he had been injured at work. In 1993, a jury heard his claim and made the fact finding that Gallego was not injured in the course of his employment on June 15, 1990.

Prior to the "no injury" finding, counsel for Gallego was reprimanded by the judge for "race-baiting" the jury.. It was an obvious attempt to bias the jury towards Gallego and wrongfully evoke sympathy. Finally, the Judge heard enough and admonished appellant's counsel for injecting race into the case:

> Now look. Let me tell you something I'm already impressed that there are two things that you are injecting into this case that I don't like, number one you are race-bating these people... I don't want you to turn this into a race case. You understand? There is no reason for that. I know why you're doing it. [Vol. 2 S.F. 11]

The judge continued, "Now if You're going to try this case, try it straight up. You don't try to inject race and you don't try to inject bad faith into this case." [Vol. 2 S.F. 12].

Prior to Gallego's counsel's attempt to race-bait the jury, Gallego gave deposition testimony. In that testimony, he clearly and unambiguously stated that he obtained "residence status" in 1991, after the accident. Counsel for Service LLoyds had a right to rely on a statement made by Gallego himself. In no way was the comment in question lie or intentional misrepresentation. The Texas 1st Court of Appeals agreed. [Opinion P. 15a, fn.3, Petition for Writ of Certiorari.]

This is not a case where Gallego was deprived of a fair trial because of his nationality or status; to the contrary, his own lawyer brandished his nationality and legal status continually and relentlessly in front of the jury.

REASONS TO DENY THE WRIT

A. Misstatements of Facts and Law by the Petitioner, Gallego.

1. During the voir dire of the jury, counsel for Gallego injected legality, race, and nationality into the case.

> Mr. Gallego is here legally, but I'd like to know whether or not that's going to have an affect on anybody, not just the fact that he's a Hispanic seeking to recover under the laws of the United States of America--which he's here legally for--but whether or not it's going to bother anyone. [Vol. 1 S.F. 30]

She continued to dwell on Gallego's nationality and race throughout her voir dire and opening statement. It was counsel for Gallego who injected nationality and status of legality into the case. When Gallego's counsel refused to cease her relentless references to race and nationality, the judge sternly reprimanded her and warned her to stop "race-baiting" the jury.

2. The comment in question was neither a lie nor an intentional misrepresentation.

Counsel for Service LLoyd relied on Gallego's own statement that he did not obtain "residence status" until 1991, after the incident. It was proper to rely on a party

statement from a sworn deposition, thus, the comment was not a lie and it was not an intentional misrepresentation. The Texas Court of Appeals rejected Gallego's argument to the contrary and firmly agreed that it was a reasonable interpretation of Gallego's own testimony. [Opinion P. 15a, fn.3, Petition for Certiorari.]

3. The Texas Court of Appeals correctly determined that there was no error.

Pursuant to Texas law, there was no error in the case, and even if error occurred, it was cured by Gallego's own testimony. Voir dire examination is a matter within the sound discretion of the trial judge and his or her judgment will not be reversed absent a clear abuse of discretion. *Haryanto v. Saeed*, 860 S.W.2d 913, 118 (Tex.App.--Houston [14th Dist.] 1993, no writ.) It was Gallego's own counsel who opened the door during her voir dire examination and invited the comment by Service Lloyds. The Texas Court of Appeals correctly determined that the comment was a response to Gallego's inflammatory voir dire. [Opinion, P. 14a, Petition for Certiorari.]

Further, the Texas Court of Appeals correctly determined that Gallego did not properly preserve any error that might have occurred. [Opinion, P.11a, Petition for Certiorari]("Gallego did not request further instruction to the jury and none was given.") The Court of Appeals also correctly ruled that the comment did not rise to incurable error because Gallego cured any error with his own testimony on the stand that he was here legally and that, additionally, Gallego's attorney was the first to raise the issue to begin with. [Opinion, P. 14a Petition for Certiorari.]

B. The decision of the Texas Court of Appeals does not conflict with the decisions of the Fifth Circuit.

Gallego relies on the *Rojas* case to support his position; however, the *Rojas* case is distinguishable from this case in several important respects. *Rojas v. Richardson*, 703 F.2d 186, (5th Cir.) 1983, *reh'g granted and judgment aff'd* 713 F.2d 116.) In the first *Rojas*, the court determined that reference to a litigant during closing argument as an illegal alien was highly prejudicial, but then it was discovered that, as here, the litigant's own counsel had raised the issue first, and that, as here, the litigant's counsel has failed to properly preserve error. Thus, the argument in closing was no longer incurable argument so the court withdrew the opinion, and affirmed the judgment of the lower court. In *Rojas*, the litigant's counsel only made one mention of the status of legality of his own client. In this case, Gallego's counsel barraged the jury with racial references concerning his status of legality during both voir dire and opening statement, until the judge was forced to stop her and reprimand her for race-baiting the jury. In this case, it was Gallego's own counsel attempting to improperly inflame the jury.

C. Gallego received due process, equal protection, and a fair trial.

Gallego received a fair trial in this case. There was an abundance of evidence that Gallego was not injured in the course of his employment on June 15, 1990. Three witnesses testified, including Gallego's own wife, to events that indicated that he was not injured and that the accident could

not have happened the way Gallego claimed it did. The jury only had to believe one of them. There were a litany of medical tests that all came back negative. The vast majority of evidence and testimony all supported the jury's finding of no injury.

Gallego was not prejudiced by Service Lloyd's comment. The comment was brief, during voir dire, invited by his own counsel, and cured by his own testimony. If he was prejudiced by anyone, it was his own counsel who relentlessly referenced his nationality and status of legality. She never let the jury forget it. Gallego received due process and equal protection under the law. The trial was fair, and the verdict was based on the weight and preponderance of the evidence.

CONCLUSION

The Court should deny the Petition for Certiorari.

Respectfully Submitted,

Edward J. Mahar
 # 12832500
LAW OFFICES OF
EDWARD J. MAHAR, P.L.L.C.
3401 Louisiana, Suite 260
Houston, TX 77002-9547
Telephone (713) 523-2914
Facsimile (713) 529-6612

No. 01-94-00883-CV

Jose Orlando Gallego
Appellant,

VS.

Service Lloyds Insurance Company
Appellee.

APPELLEE'S BRIEF

TO THE COURT OF APPEALS:

Appellee, Service Lloyds Insurance Company, submits this brief in response to an appeal of a judgment adverse to the appellant.

For clarity, appellant will be refered to as "appellant" and appellee will be referred to as "appellee."

BRIEF OF ARGUMENT (REPLY POINTS 4-6)

REPLY POINT FOUR

The trial court was correct in overruling appellant's motion for mistrial on the grounds of improper jury argument because the verdict was grounded upon proper proceedings and evidence and the argument did not constitute reversible error.

REPLY POINT FIVE

The trial court was correct in overruling appellant motion for new trial on the grounds of incurable jury argument because the argument was not so prejudicial and inflammatory that it could not have been cured.

REPLY POINT SIX

The trial court was correct in overruling appellant's motion for mistrial and motion for new trial because the argument was not so prejudicial and inflammatory as to deny the appellant his right to a fair trial.

STATEMENT OF FACTS FOR REPLY POINTS FOUR, FIVE, AND SIX

During the Voir Dire of the jury, counsel for the appellant injected legality, race, and nationality into the case:

> Mr. Gallego is here legally, but I'd like to know whether or not that's going to have an affect on anybody, not just the fact that he's a Hispanic seeking to recover under the laws of the United States of America -- which he's here legally for -- but whether or not its going to bother anyone. [Vol 1 S.F. 30].

She continued to mention the appellants nationality and race throughout her voir dire and opening statements. The potential jury members were questioned by the appellant on how they felt about someone of the appellant's race and nationality [Vol. 1 S.F. 31, 33]. This opened the door for arguments in those areas.

Appellant complained of an argument by appellee's counsel and made an objection. [Vol. 1 S.F. 43]. After she objected, appellee's counsel replied,"She opened the door. I'll drop it." [Vol. 1 S.F. 43]. **He completely abandoned the argument at that time.** Appellant's counsel went on to mention the race and nationality of the appellant many times. [Vol 2 S.F. 3,4]. The judge finally stopped the appellant's counsel and instructed her to stop race-baiting the jury [Vol. 2 S.F. 11].

The jury returned a verdict of no injury, properly based on the evidence presented in this case. [Vol. 3 S.F. 2].

ARGUMENT AND AUTHORITIES FOR REPLY POINTS FOUR, FIVE, AND SIX

A. Standards of Review for curable and incurable jury argument.

Voir dire examination is a matter within the sound discretion of the trial judge and his or her judgment will not be reversed absent clear abuse of discretion. *Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex.App.--Houston [14th Dist.] 1993, writ denied.)

Improper jury argument may only be reversible error if there is (1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, (4) that was not curable by an instruction, by a prompt withdrawal of the statement, or by a reprimand by the judge, and (5) the argument, by its nature, degree, and extent constitutes reversibly harmful error, including the argument's probable effect on a material holding. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839-40 (Tex. 1979). The

appellant must show that the probability that the argument caused harm is greater than the probability that the verdict was based upon proper proceedings and evidence. *Id.* at 839-40.

In determining whether an argument was incurable, the court must examine the argument in light of the whole record, beginning with voir dire and ending with closing argument. *Haryanto v. Saeed*, 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) "The court must look at the length of the argument, whether it was repeated or abandoned, whether there was cumulative error, and the probable effect of the argument on a material finding." *Haryanto*, 860 S.W.2d at 920.

B. The argument in this case was not incurable

In this case, the argument was very brief, one sentence. [Vol. 1 S.F. 42-43]. The argument was immediately abandoned by counsel [Vol. 1 S.F. 43] and never again repeated by counsel for the appellee. The argument concerned whether or not the appellant was working in the country legally, a fact the appellant's own counsel injected into the case. Argument outside the record is ordinarily curable by a timely objection and prompt instruction to disregard. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 840-41 (Texas 1979). Because any argument along the lines complained of was promptly discontinued, any error was cured.

The probable effect on the jury's verdict was none. The jury only answered one question, whether or not the appellant was injured. The jury found that the appellant was not injured. [Vol. 3 S.F. 2] The question did not have anything to do with how much money he should receive or at what rate. It was a purely objective question that was

answered based on the preponderance of the evidence that showed that the appellant was not injured.
In light of the brief nature of the argument and the strength of the evidence in support of the jury's verdict of no injury, the appellant's points of error four, five, and six should be overruled.

C. The argument was invited and provoked by counsel for appellant.

Counsel for the appellant invited and provoked any comment made by counsel for the appellee during Voir Dire. Appellant's counsel discussed the appellant's nationality and status of legality at great length in her voir dire and opening statement. During opening statement, she was reprimanded by the judge for attempting to "race bait" the jury. [Vol. 2 S.F. 11].

1. Statements by counsel for appellant during voir dire.

Appellants counsel invited any statements concerning nationality and legality with her remarks made during voir dire. She mentioned the appellant's status in this country several times during voir dire, in an effort to evoke sympathy from the jury for his alien status. " Mr. Gallego is here legally, but I'd like to know whether or not that's going to have an affect on anybody, not just the fact that he's a Hispanic seeking to recover under the laws of the United States of America -- which he's here legally for -- but whether or not its going to bother anyone." [Vol 1 S.F. 30]. She continued with, "He speaks English, but with a very, very heavy thick accent." [Vol. 1 S.F. 31]. When she was discussing the nationality of the appellant and his status in the country, she also spent time asking the jurors how they felt about it. One potential juror replied, "I don't have a

problem with Hispanic gentlemen. I'd just like to know does he speak English at all or understand English at all?" [Vol 1 S.F. 31]. Later on she asked if anyone had a problem "with a man like Mr. Gallego filing a claim for workers compensation" [Vol. 1 S.F. 33]. After counsel was finished with her speech on nationality and legality, the jury had spent several minutes dwelling on the fact that Mr. Gallego was Hispanic, whether or not he was here legally, and the fact he was from Columbia.

It was counsel for the appellant who injected race, nationality, and status of legality into the case. She talked to the jurors about it repeatedly. She kept it on their minds. Appellant's counsel made it an issue in the case.

2. Statements by Counsel for Appellant during Opening Statement

During her opening statement, counsel for the appellant continued to dwell on the appellant's race and nationality. "We can see a slight Hispanic male standing on..." [Vol. 2 S.F. 3] "And we see this Hispanic male spraying and coating..." [Vol. 2 S.F. 3]. "Mr. Gallego, the Hispanic male that we all saw..." [Vol 2 S.F. 4]. She repeatedly brought the fact that the appellant was Hispanic to the jury.

Finally, the Judge heard enough and admonished appellant's counsel for injecting race into the case.

"Now look. Let me tell you something I'm already impressed that there are two things that you are injecting into this case that I don't like, number one you are race-bating these people... I don't want you to turn this into a race case. You understand? There is no reason for that. I know why you're doing it." [Vol. 2 S.F. 11]

The judge continued, "Now if You're going to try this case, try it straight up. You don't try to inject race and you don't try to inject bad faith into this case." [Vol. 2 S.F. 12].

All of the comments in opening statement by the appellant occurred after any argument made by counsel for appellee in voir dire. After the initial objection of appellant's counsel, counsel for the appellee never mentioned race or nationality again. It was only the appellant's counsel who continued to do so until she was stopped by the judge.

C. Any error was not preserved by proper trial predicate.

Error was not properly preserved by the appellant at the time of the alleged error. Immediately after the alleged improper argument, the following exchange took place:

> MS. MAGAN: I was objecting because I thought I heard you say that he was not here legally.
>
> MR. MAHAR: He stated he was illegal when he came in. He wasn't legalized until; 1991. That's a year after the accident. He said it in his deposition.
>
> MS. MAGAN: That's untrue.
>
> MR. MAHAR: I'll read it to you, Judge.
>
> THE COURT: I don't want to listen --
>
> MR. MAHAR: She opened the door. I'll drop it.
>
> MS. MAGAN: Your Honor, at this time -- and perhaps this is a problem because we didn't have our motion in limine before we brought in the jury, and

I'm sorry for that, but I would like to object to any reference that Mr. Gallego came into the United States illegally.

THE COURT: Does it matter, just because she mentioned it?

MS. MAGAN: It's whether or not he was legal at the time he was injured.

THE COURT: Does it make a difference?
MS. MAGAN: I think its awfully prejudicial.

THE COURT: The issue is whether he's here legally.

MR. MAHAR: Why did she even bring it up? I wouldn't have done anything about it, but she brought it up.

THE COURT: Go on to something else. It's not going to be in the charge. It isn't relevant to these people. I may correct it with an instruction.
[Vol. 1 S.F. 43-44].

1. Objection did not preserve error.

A clear and specific objection to the mention of illegality was never given by appellant's counsel at the time of the alleged error. To preserve error, objections must be clear and specific. *McCormick v, Texas Commerce Bank,* 751 S.W.2d 887, 890 (Tex.App.--Houston [14th Dist.] 1988, writ denied). Appellant's objection was neither clear nor specific. [Vol. 1 S.F. 43-44]. To preserve error, objections must be made, and a ruling obtained, at the time of the error. *Texas Employers Ins. Ass'n. v. Haywood,* 266 S.W.2d

856, 858 (Tex. 1954) No ruling was ever obtained from the judge on the objection she did give. [Vol. 1 S.F. 43-44]. Error was not properly preserved at the time of the alleged improper argument and appellant's points of error four, five, and six should be overruled.

2. Motion for instruction did not preserve error.

Error was also not preserved properly through a motion for mistrial or a motion to instruct the jury to disregard. Several hours after the alleged error, just before the jury was seated, counsel for appellant made the following motion to instruct.

> MS. MAGAN: Or I would ask His Honor to instruct the jury to disregard that because of falsity.
>
> THE COURT: I'll deal with that at the end of trial. Your motion is overruled.
> [Vol. 1 S.F. 74]

Objections at the time of trial must be the same as objections on appeal. At trial she moved for an instruction based on the falsity of the statement. On appeal, she is appealing the prejudicial and inflammatory nature of the argument. An objection at trial that is not the same as an objection urged on appeal presents nothing for review. *Haryanto v. Saeed*, 860 S.W.2d 913, 921 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) She did not appeal the argument based on falsity, therefore, error was

not preserved through her motion to instruct the jury and the appellant's points of error four, five, and six should be overruled.

3. No motion for mistrial was made on the record.

No motion for mistrial was made on the record by the appellant. The appellant told the court that a motion for mistrial would be made, but one was not made.

> MS. MAGAN: Madame court reporter has said that she will be able to by tomorrow morning find that place in the record where Mr. Mahar has stated to the jury that Mr. Gallego was work--at the time he was working here illegally, which is untrue. If that is the case, if indeed he said that, and I did question him at the bench at the time that he made that statement, I would ask for a mistrial based on the falsity of misinformation of what the facts are.
>
> THE COURT: Fine. You can find it. If I mistry it, we'll reset it on the docket and we'll be back whenever we get to you. You can make that motion. I don't care it's--
> [Vol 1 S.F. 73-74].

No motion for mistrial was ever made or overruled, one was only discussed. Further, the motion would hve been made on falsity, not prejudice that she is urging on appeal. Thus, error was not properly preserved by a motion for mistrial and the appellant's points of error four, five, and six should be overruled.

D. The argument by its nature degree and extent did not constitute reversibly harmful error.

After the lengthy discussion by appellant's counsel on nationality, race, and legality during voir dire, counsel for appellee said one sentence that appellant argues was improper argument. After that sentence, appellant objected and counsel for the appellee replied,"She opened the door. I'll drop it." [Vol. 1 S.F. 43]. He dropped it and never mentioned it again. Appellant's counsel, however, brought up nationality and race time and time again until finally, the judge instructed her to stop "race-baiting" the jury. [Vol. 2 S.F. 11].

Considering the fact that appellant's counsel spent much time discussing the subject of the comment, that the comment was brief, and no further comments were said (by appellee's counsel), the argument could not rise to reversible error by its nature degree and extent. There are only rare instances of incurable harm from improper jury argument. *Haryanto v. Saeed*, 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) This was a case where the argument complained of was brief, and never referred to again. In light of the record as a whole, the argument was not reversible error and appellants points of error four, five, and six should be overruled.

E. Conclusion for Reply Points Four, Five, and Six

Under the facts and circumstances of this case, counsel for the appellee did not commit error during his argument to the jury. The argument complained of was invited and provoked by the counsel for the appellant. It was appellant's counsel who discussed nationality and race at great length with the jury. It was appellant's counsel who was reprimanded by the judge for race-baiting the jury.

The complained of argument was not an incurable argument. When the argument was complained of, that line of argument was abandoned. The argument was not inflammatory or prejudicial. The appellant's counsel had been discussing the issue with the jury throughout her voir dire. Given the circumstances of this particular case and the record as a whole, it is clear that the appellant was attempting to use his nationality to evoke sympathy from the jury. The appellant injected the issue into the case.

The evidence in this case was strong, with two witnesses testifying that the accident could not have happened the way the appellant claimed and medical records that showed he was not injured. The verdict of the jury was soundly based on the evidence, not on prejudice. The judgment of the court below should be affirmed.

Respectfully Submitted,

EDWARD J. MAHAR
3401 Louisiana, Suite 320
Houston, Texas 77002-9547
Telephone (713) 523-2914
Fax Number(713) 529-6612
Attorney for Appellee.
Service Lloyds Ins. Co.

No. _____

IN THE
SUPREME COURT
OF TEXAS

Jose Orlando Gallego,
Petitioner,

VS.

Service Lloyds Insurance Company,
Respondent.

Appealed from the First Court of Appeals
Harris County, Texas
Court of Appeals Cause No. 01-94-00883-CV

RESPONSE TO WRIT OF ERROR

Edward J. Mahar
SBN: 12832500
3401 Louisiana, Suite 260
Houston, Texas 77002-5947
Telephone: (713) 523-2914
Telefax: (713) 529-6612
Attorney for Respondent,
Service Lloyds Insurance Co.

ARGUMENT AND AUTHORITIES FOR REPLY POINT ONE THROUGH SIX

I. The Court of Appeals was Correct in holding that Gallego's attorney invited the comment by opposing counsel during voir dire when she made repeated biased references to the Hispanic ethniticity of her client, including the status of his legality and that any alleged error was curable by an instruction to disregard the statement.

A. Introduction.

Counsel for petitioner is attempting to obfuscate the issues by accusing Respondent's counsel of lying and dishonesty. The facts reveal that counsel for respondent was relying on sworn testimony of the petitioner himself. The facts reveal that the employment authorization card relied upon by petitioner was never offered as evidence in this case, was never authenticated, and was never referred to at trial. The card is completely outside the record and proves nothing. Petitioner's diatribe on unethical behavior ignores the fact that the Respondent relied on Petitioner's own sworn testimony.

B. Standards of Review for curable and incurable jury argument.

Voir dire examination is a matter within the sound discretion of the trial judge and his or her judgment will not be reversed absent clear abuse of discretion. *Haryanto v. Saeed,* 860 S.W.2d 913, 918 (Tex.App.--Houston [14th Dist.] 1993, writ denied.)

Improper jury argument may only be reversible error if there is (1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, (4) that was not curable by an instruction, by a prompt withdrawal of the statement, or by a reprimand by the judge, and (5) the argument by its nature degree, and extent constitutes reversibly harmful error, including the arguments probable effect on a material holding. *Standard Fire Ins. Co. v. Reese,* 584 S.W.2d 835, 839-40 (Tex. 1979). The petitioner must show that the probability that the argument caused harm is greater than the probability that the verdict was based upon proper proceedings and evidence. *Id* at 839-40.

In determining whether an argument is incurable, the court must examine the argument in light of the whole record, beginning with voir dire and ending with closing argument. *Haryanto v. Saeed,* 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) "The court must look at the length of the argument, whether it was repeated or abandoned, whether there was cumulative error, and the probable effect of the argument on a material finding." *Haryanto*, 860 S.W.2d at 920.

The First Court of Appeal correctly applied these tests and determined that petitioner was not able to prove any of the elements for incurable argument and that even if there was error it was curable and, in fact, cured. Opinion at 10.

C. The argument was invited and provoked by counsel for petitioner.

Counsel for Petitioner invited and provoked any comment made by counsel for the Respondent during voir

dire. Petitioner's counsel repeatedly discussed the petitioner's nationality and status of legality at great length in her voir dire and opening statement. During opening statement, she was reprimanded by the judge for attempting to "race bait" the jury. [Vol. 2 S.F. 11]

1. Statements by counsel for petitioner during voir dire.

Petitioner's counsel invited any statements concerning nationality and legality with her remarks made during voir dire. She mentioned the appellant's status in this country several times during voir dire, in an effort to evoke sympathy from the jury for his alien status. "Mr. Gallego is here legally, but I'd like to know whether or not that's going to have an effect on anybody, not just the fact that he's a Hispanic seeking to recover under the laws of the United States of America -- which he's here legally for -- but whether or not it's going to bother anyone." [Vol. 1 S.F. 30] She continued with, "He speaks English, but with a very, very heavy thick accent." [Vol. 1 S.F. 31] When she was discussing the nationality of the applicant and his status in the country, she also spent time asking the jurors how they felt about it. One potential juror replied, "I don't have a problem with Hispanic gentlemen. I'd just like to know does he speak English at all or understand English at all?" [Vol. 1 S.F. 31] Later on she asked if anyone had a problem "with a man like Mr. Gallego filing a claim for worker's compensation." [Vol. 1 S.F. 33] After counsel was finished with her speech on nationality and legality, the jury had spent several minutes dwelling on the fact that Mr. Gallego was Hispanic, whether or not he was here legally, and the fact that he was from Columbia.

It was counsel for the petitioner who injected race, nationality, and status of legality into the case. She talked to jurors about it repeatedly. She kept it on their minds and made it an issue in the case. If anyone was trying to use race and nationality to bias the jury, it was the petitioner's own counsel.

2. Statements by Counsel for Petitioner during Opening Statement.

During her opening statement, counsel for the petitioner continued to dwell on petitioner's race and nationality. "We can see a slight Hispanic male standing on..." [Vol. 2 S.F. 3] "And we see this Hispanic male spraying and coating..." [Vol. 2 S.F. 3] "Mr. Gallego, the Hispanic male that we all saw..." [Vol. 2 S.F. 4] She repeatedly and relentlessly brought the fact that the petitioner was Hispanic to the jury.

Finally, the judge heard enough and admonished petitioner's counsel for injecting race into the case. "Now look. Let me tell you something I'm already impressed that there are two things that you are injecting into this case that I don't like, number one you are race baiting these people...I don't want you to turn this into a race case. You understand? There is no reason for that. I know why you're doing it." [Vol. 2 S.F. 11] The judge continued, "Now if you're going to try this case, try it straight up. You don't try to inject race and you don't try to inject bad faith into this case." [Vol. 2 S.F. 12] It required direct admonishment from the trial judge prevent petitioner's attempts to prejudice the jury herself.

All of the comments petitioner made in opening statement were after respondent's statement in voir dire. After the initial objection by petitioner's counsel, counsel for the respondent never mentioned race or nationality again. It was only the appellant's counsel who continued to do so until she was stopped by the judge.

3. Petitioner was Not Deprived of Due Process or Equal Protection.

Petitioner was given a full and complete trial on the merits. Any error that may have occurred was cured by petitioner's own testimony. The comment by respondent did not rise to the level of so inflammatory that it deprived petitioner of a fair trial. After counsel for petitioner finished with her own voir dire and opening statement, the jury could not help to be dwelling on the fact that he was a "Hispanic gentleman" from Colombia.

4. Verdict was Properly Based on Evidence Presented at Trial.

The jury verdict of no injury was properly based on the abundance of evidence presented at trial by respondent that the petitioner was in fact not injured in the course of his employment on June 15, 1990. The comment by respondent's counsel during voir dire had no effect on the jury's verdict, especially since the comment was very brief and only brought up over and over again by petitioner's own counsel

D. Any Error was Not Preserved by Proper Trial Predicate.

Error was not properly preserved by the appellant at the time of the alleged error. Immediately after the alleged

improper argument, the following exchange took place:

MS. MAGAN: I was objecting because I thought I heard you say that he was not here legally.

MR. MAHAR: He stated he was illegal when he came in. He wasn't legalized until 1991. That's a year after the accident. He said it in his deposition.

MS. MAGAN: That's untrue.

MR. MAHAR: I'll read it to you, Judge.

THE COURT: I don't want to listen--

MR. MAHAR: She opened the door. I'll drop it.

MS. MAGAN: Your honor, at this time -- and perhaps this is a problem because we didn't have our motion in limine before we brought in the jury, and I'm sorry for that, but I would like to object to any reference that Mr. Gallego came into the United States illegally.

THE COURT: Does it matter, just because she mentioned it?

MS. MAGAN: It's whether or not he was legal at the time he was injured.

THE COURT: Does it make a difference?

MS. MAGAN: I think its awfully prejudicial.

THE COURT: The issue is whether he's here legally.

MR. MAHAR: Why did she even bring it up? I wouldn't have done anything about it, but she brought it up.

THE COURT: Go on to something else. It's not going to be in the charge. It isn't relevant to these people. I may correct it with an instruction. [Vol. 1 S.F. 43-44].

1. Objection did Not Preserve Error.

A clear and specific objection to the mention of illegality was never given by petitioner's counsel at the time of the alleged error. To preserve error, objections must be clear and specific. *McCormick V. Texas Commerce Bank*, 751 S.W.2d 887, 890 (Tex.App.--Houston [14th Dist.] 1988, writ denied) Petitioner's objection was neither clear nor specific. [Vol. 1 S.F. 43-44] To preserve error, objections must be made, and a ruling obtained, at the time of the error. *Texas Employer's Ins. Ass'n V. Haywood,* 266 S.W.2d 856, 858 (Tex. 1954) No ruling was ever obtained from the judge on the objection she did made. [Vol. 1 S.F. 43-44] Thus, error was not properly preserved at the time of the alleged improper argument.

2. Motion for Instruction did Not Preserve Error.

Error was also not preserved properly through a motion for mistrial or a motion to instruct the jury to disregard. Several hours after the alleged error, just before the jury was seated, counsel for petitioner made the

following motion to instruct:

> MS. MAGAN: Or I would ask His Honor to instruct the jury to disregard that because of falsity.
> THE COURT: I'll deal with that at the end of trial. Your motion is overruled.
> [Vol. 1 S.F. 74]

Objections at the time of trial must be the same as objections on appeal. At trial she moved for an instruction based on the falsity of the statement. On appeal to the First Court of Appeals, she appealed the prejudicial and inflammatory nature of the argument. An objection at trial that is not the same as an objection urged on appeal presents nothing for review. *Haryanto v. Saeed*, 860 S.W.2d 913, 921 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) She did not appeal the argument based on falsity, therefore error was not preserved through her motion to instruct the jury.

Her attempt to refocus her appellate issue of prejudicial and inflammatorily to one of falsity from the Court of Appeals to the Supreme Court should not be given credence. She did not appeal the issue to the Court of Appeals and it should not be allowed to be introduced for the first time in the Supreme Court.

3. No Motion for Mistrial was made on the Record.

No motion for mistrial was made on the record by the petitioner. The petitioner told the court that a motion for mistrial would be made, but one was not made.

> MS. MAGAN: Madame court reporter has said that she will be able to by tomorrow morning find that place in the record where Mr. Mahar has stated to the

> jury that Mr. Gallego was work--at the time he was working here illegally, which is untrue. If that is the case, if indeed he said that, and I did question him at the bench at the time that he made that statement, I would ask for a mistrial based on the falsity of misinformation of what the facts are.
>
> THE COURT: Fine. You can find it. If I mistry it, we'll reset it on the docket and we'll be back whenever we get to you. You can make that motion. [Vol. 1 S.F. 73-74]

No motion for mistrial was ever made or overruled, one was only discussed. Further, the motion would have been made on falsity, not prejudice that she is urging on appeal. (At least that is what she urged on appeal to the First Court of Appeals.) Therefore, error was not properly preserved by a motion for mistrial.

E. The Argument by its Nature, Degree, and Extent did Not Constitute Reversibly Harmful Error.

Even if petitioner had preserved error, the error was not reversible error. After the lengthy discussion by petitioner's counsel on nationality, race, and legality during voir dire, counsel for respondent said one sentence that petitioner argues was improper argument. After that sentence, petitioner objected and counsel for respondent replied, "She opened the door. I'll drop it." [Vol. 1 S.F. 43] He dropped it and never mentioned it again. Petitioner's counsel, however, brought up nationality and race time and time again until finally, the judge instructed her to stop "race-baiting" the jury. [Vol. 2 S.F. 11]

Considering the fact that petitioner's counsel spent much time discussing the subject of the comment, that the

comment was brief, and no further comments were said (by respondent's counsel), the argument could not rise to reversible error by its nature, degree, and extent. There are only rare instances of incurable harm from improper jury argument. *Haryanto v. Saeed,* 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) This was a case where the argument complained of was brief and never referred to again. In light of the record as a whole, the argument was not reversible error.

F. Any Error was Cured by Testimony of Petitioner.

As the Court of Appeals noted, even if the statement was error and that error was preserved by petitioner, the error was cured by the testimony of the petitioner himself. The petitioner testified that he was in the country legally at the time of the injury. This testimony cured any error. *See Haryanto*, 860 S.W.2d at 919. Using the reasoning of *Haryanto,* petitioner's counsel had the opportunity to cure, and did cure, any prejudice that might have occurred because of respondent's voir dire comment.

G. Comment Was Not Based on a Lie or Knowing Falsity.

In petitioner's brief his counsel makes several incorrect assumptions that pervade all of her arguments concerning the comment by respondent's counsel. She wrongly states that the comment was a lie made with the intent to deceive; however, the evidence clearly shows that when respondent's counsel made the comment, he was relying on sworn testimony of the petitioner. Whether or not the testimony was interpreted exactly correctly by respondent's counsel does not raise the issue to an ethical question. If petitioner did not approve of the way his sworn testimony was interpreted, he had the opportunity, and used

it, to correct any misinterpretation of his testimony. Petitioner's vehement attack on respondent's counsel and her effort to construe the comment as a malicious attack on petitioner fail utterly in light of the facts and evidence that clearly show respondent's justifiable reliance on the sworn testimony of the petitioner. On the record, respondent's counsel clearly stated his basis for the comment, Mr. Gallego "stated he was illegal when he came in. He wasn't legalized until 1991. That's a year after the accident. He said it in his deposition." [Vol. 1 S.F. 43-44].

The First Court of Appeals addressed this attack by petitioner in their opinion:

Gallego contends that Service Lloyds knowingly made a false statement to the jury panel during voir dire. This is not supported by the record. No evidence showed Gallego's employment authorization card was received from Service Lloyds, as alleged in the motion for new trial. *See Estate of Arrington v. Fields*, 578 S.W.2d 173, 180 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.). Moreover, the authenticity of the purported employment authorization card was never proved. A copy was attached to the motion for new trial, but there was no hearing on the motion for new trial, and the copy is not self proving. Finally, Service Lloyds' response to the motion for new trial contains Gallego's deposition testimony that he obtained "residence status" in 1991, after these events occurred. Opinion p. 11, Fn 3.

Petitioner's attempt to prove knowing falsity rests on her assumption that respondent's counsel "knew" the employment authorization card was authentic even though she did not prove it up or attempt to enter it into evidence. She also asserts that because the petitioner is suing the respondent for defamation, they should concede the case and just assume his allegations are correct. The defamation issue was not tried in this case and is not currently on trial. To suggest that the allegations in that case should be taken as true against the defense attorney is to concede the whole defamation case and deny the respondent of their right to a defense and a trial on the merits.[1]

H. Conclusion for Reply Points One through Six.

The comment complained of was invited and provoked by counsel for petitioner. It was she who injected race, nationality, and status of legality onto the case. It was she who was reprimanded by the judge for "race baiting" the jury. Even if the comment created error, that error was not so inflammatory as to be incurable argument and petitioner failed to preserve error for appeal through proper trial predicates. The comment by its nature, degree, and extent did not constitute reversibly harmful error. The comment was brief and the subject completely dropped by respondent's counsel. Finally the comment was based on the sworn testimony of the petitioner himself. For all of these reasons, petitioner's points of errors one through six should be overruled and the judgments of the trial court and the First Court of Appeals should be affirmed.

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[1] The defamation case was severed from the worker's compensation case to avoid confusion of the issues. Counsel for petitioner was reprimanded by the trial judge for attempting to bring bad faith type issues into the trial, and she is still attempting to inject such inflammatory material into this appeal. [Vol. 2 S.F. 11]

Respectfully Submitted,

By: _____

Edward J. Mahar #12832500
3401 Louisiana, Suite 260
Houston, Tx 77002-9547
Telephone: (713) 523-2914
Telefax: (713) 529-6612
Attorney for Respondent,
Service Lloyds Insurance Co.

No. 95-0613

IN THE
SUPREME COURT
OF TEXAS

Jose Orlando Gallego,
Petitioner,
VS.
Service Lloyds Insurance Company,
Respondent.

Appealed from the First Court of Appeals
Harris County, Texas

Court of Appeals Cause No. 01-94-00883-CV

ANSWER TO MOTION FOR REHEARING

Edward J. Mahar
SBN: 12832500
3401 Louisiana, Suite 260
Houston, Texas 77002-5947
Telephone: (713) 523-2914
Telefax: (713) 529-6612
Attorney for Respondent,
Service Lloyds Insurance Co.

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ANSWER TO MOTION FOR REHEARING

Respondent, Service Lloyds Insurance Company, submits this Answer to Petitioner's Motion for rehearing and respectfully requests that Petitioner's Motion be denied in its entirety.

STATEMENT OF REPLY POINT
REPLY POINT ONE

The Supreme Court was correct in denying petitioner's writ of error because the Court of Appeals has correctly held that petitioner's attorney invited the comment by opposing counsel during voir dire, that any alleged error was curable by an instruction to disregard the statement, that any alleged error was "cured by the uncontested evidence presented during trial" that the alleged error was not an appeal to racial, religious, or national prejudice, and that the alleged error did not deprive Gallego of a fair trial and did not constitute reversible error.

I. BACKGROUND

During voir dire of the jury, counsel for petitioner injected legality, race, and nationality into the case. She continued to mention petitioner's nationality and race throughout her voir dire and opening statements. The potential jury members were questioned by appellant on how they felt about someone of the appellant's race and nationality. [Vol. 1 S.F. 31, 33] This opened the door for arguments in those areas.

Petitioner complained of an argument by Respondent's counsel and made an objection. [Vol. 1 S.F. 43] After she objected, Respondent's counsel replied, "She opened the door. I'll drop it." [Vol. 1 S.F. 43] He completely abandoned the argument at that time. **Petitioner's counsel, however, went on to mention the race and nationality of the petitioner many times and would not stop until the judge reprimanded her and instructed her to stop race baiting the jury.** [Vol. 2 S.F. 3, 4, 11]

II.

BRIEF OF ARGUMENT
REPLY POINT ONE

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III.

ARGUMENT AND AUTHORITIES FOR REPLY POINT ONE

The Court of Appeals was correct in affirming the jury's verdict of no injury in this case. Counsel for petitioner is attempting to obfuscate the issues. The only attorney to act improperly and make statements designed to bias the jury was counsel for the petitioner. The facts reveal that the statement in question, made by counsel for respondent, was clearly based on sworn testimony of the petitioner himself. As the Court of Appeals noted in their Opinion, the petitioner gave sworn deposition testimony that he was not a legal resident until 1991. *Opinion p.11, Fn 3.* Counsel for the Respondent was entitled to rely on the statements made by the petitioner, and counsel for the petitioner was at the deposition where she had the full opportunity to clear up any alleged misunderstandings. The Court of Appeals further agreed that petitioner's own attorney was the first to raise the issue of petitioner's nationality in her effort to "race-bait" the jury. *Opinion p. 10-11.*

Voir dire examination is a matter within the sound discretion of the trial judge and his or her judgment will not be reversed absent clear abuse of discretion. *Haryanto v. Saeed,* 860 S.W.2d 913, 918 (Tex.App.--Houston [14th Dist.] 1993, writ denied.)

Improper jury argument may only be reversible error if there is (1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, (4) that was not curable by an instruction, by a prompt withdrawal of the statement, or by a reprimand by the judge, and (5) the argument by its nature degree, and extent

constitutes reversibly harmful error, including the arguments probable effect on a material holding. *Standard Fire Ins. Co. v. Reese,* 584 S.W.2d 835, 839-40 (Tex. 1979). The petitioner must show that the probability that the argument caused harm is greater than the probability that the verdict was based upon proper proceedings and evidence. *Id* at 839-40. In this case, petitioner failed to show any one of the requirements.

In determining whether an argument is incurable, the court must examine the argument in light of the whole record, beginning with voir dire and ending with closing argument. *Haryanto v. Saeed,* 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) "The court must look at the length of the argument, whether it was repeated or abandoned, whether there was cumulative error, and the probable effect of the argument on a material finding." *Haryanto*, 860 S.W.2d at 920.

The First Court of Appeal correctly applied these tests and determined that petitioner was not able to prove any of the elements for incurable argument and that even if there was error it was curable and, in fact, cured. *Opinion at 10.*

Petitioner was given a full and complete trial on the merits. Any error that may have occurred was cured by petitioner's own testimony. The comment by respondent did not rise to the level of so inflammatory that it deprived petitioner of a fair trial. After counsel for petitioner finished with her own voir dire and opening statement, the jury could not help but to dwell on the fact that petitioner was a "Hispanic gentleman" from Colombia.

The jury verdict of no injury was properly based on the abundance of evidence presented at trial by respondent that the petitioner was in fact not injured in the course of his

employment on June 15, 1990. The comment by respondent's counsel during voir dire had no effect on the jury's verdict, especially since the comment was very brief and only brought up over and over again by petitioner's own counsel.

Considering the fact that petitioner's counsel spent much time discussing the subject of the comment, that the comment was brief, and no further comments were said (by respondent's counsel), the argument could not rise to reversible error by its nature, degree, and extent. There are only rare instances of incurable harm from improper jury argument. *Haryanto v. Saeed,* 860 S.W.2d 913, 919 (Tex.App.--Houston [14th Dist.] 1993, writ denied.) This was a case where the argument complained of was brief and never referred to again. In light of the record as a whole, the argument was not reversible error.

As the Court of Appeals noted, even if the statement was error and that error was preserved by petitioner, the error was cured by the testimony of the petitioner himself. The petitioner testified that he was in the country legally at the time of the injury. This testimony cured any error. *See Haryanto*, 860 S.W.2d at 919. Using the reasoning of *Haryanto,* petitioner's counsel had the opportunity to cure, and did cure, any prejudice that might have occurred because of respondent's voir dire comment.

In petitioner's Motion for Rehearing his counsel makes several incorrect assumptions that pervade all of her arguments concerning the comment by respondent's counsel. She wrongly states that the comment was a lie made with the intent to deceive; however, the evidence clearly shows that when respondent's counsel made the comment, he was relying on sworn testimony of the petitioner. If petitioner did not approve of the way his sworn testimony was

interpreted, he had the opportunity, and used it, to correct any misinterpretation of his testimony. Petitioner's vehement attack on respondent's counsel and her effort to construe the comment as a malicious attack on petitioner fail utterly in light of the facts and evidence that clearly show respondent's justifiable reliance on the sworn testimony of the petitioner. On the record, respondent's counsel clearly stated his basis for the comment, Mr. Gallego "stated he was illegal when he came in. He wasn't legalized until 1991. That's a year after the accident. He said it in his deposition." [Vol. 1 S.F. 43-44].

The First Court of Appeals addressed this attack by petitioner in their opinion:

> Gallego contends that Service Lloyds knowingly made a false statement to the jury panel during voir dire. This is not supported by the record. No evidence showed Gallego's employment authorization card was received from Service Lloyds, as alleged in the motion for new trial. *See Estate of Arrington v. Fields*, 578 S.W.2d 173, 180 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.). Moreover, the authenticity of the purported employment authorization card was never proved. A copy was attached to the motion for new trial, but there was no hearing on the motion for new trial, and the copy is not self proving. Finally, Service Lloyds' response to the motion for new trial contains Gallego's deposition testimony that he obtained "residence status" in 1991, after these events occurred. Opinion p. 11, Fn 3.

Petitioner's attempt to prove knowing falsity rests on her assumption that respondent's counsel "knew" the employment authorization card was authentic even though she did not prove it up or attempt to enter it into evidence.

As the plaintiff in the trial court, the petitioner had the burden of proof on the jury question of injury. *Reed v. Aetna,* 535 S.W.2d 377, 378 (Tex.App.--Beaumont 1976, writ ref'd n.r.e.) The jury found by a preponderance of the evidence that the petitioner was not injured in the course of his employment. [Vol. 3 S.F. 1] The accident was an unwitnessed accident and the plaintiff was the only witness to testify as to the occurrence of the alleged fall. While the jury could have accepted the testimony of the petitioner, it was not bound to do so. *Glockzin* at 667. The jury is entitled to disbelieve the claimant's testimony and render a verdict against the claimant. *Reed* at 380. That is exactly what happened in this trial, the jury listened to all of the evidence and decided not to believe the petitioner.

CONCLUSION AND PRAYER

The comment complained of was invited and provoked by counsel for petitioner. It was she who injected race, nationality, and status of legality onto the case. It was she who was reprimanded by the judge for "race baiting" the jury. Even if the comment created error, that error was not so inflammatory as to be incurable argument. The comment by its nature, degree, and extent did not constitute reversibly harmful error. The comment was brief and the subject completely dropped by respondent's counsel. Finally the comment was based on the sworn testimony of the petitioner himself. For all of these reasons, petitioner's Motion for Rehearing should be denied.

Respectfully Submitted,

By: _____

Edward J. Mahar #12832500
3401 Louisiana, Suite 260
Houston, Tx 77002-9547
Telephone: (713) 523-2914
Telefax: (713) 529-6612
Attorney for Respondent,
Service Lloyds Insurance Co.